TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 117.

THE WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

THE CALL PUBLISHING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED AUGUST 31, 1900.

(17,469.)

(17,487.)

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1 THE CALL PUBLISHING CO.
v.
THE WESTERN UNION TELEGRAPH CO. } No. 8610.

Pleas before the supreme court of the State of Nebraska, at a term thereof begun and holden at the capitol, in the city of Lincoln, in said State, on the 5th day of January, 1899.

Present: Hon. T. O. C. Harrison, chief justice; Hon. T. L. Norval, Hon. J. J. Sullivan, judges.
Attest: D. A. CAMPBELL. *Clerk.*

Be it remembered that on the 2nd day of July, 1896, there were filed in the office of the clerk of said court a certain petition, transcript, and bill of exceptions in words and figures following, to wit:

In the Supreme Court of the State of Nebraska.

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff,
vs.
THE CALL PUBLISHING COMPANY, Defendant. } Petition in Error.

Comes now the plaintiff herein and, complaining of the defendant herein, says that on the 13th day of February, 1896, the defendant herein recovered a judgment against this plaintiff in the district court of Lancaster county, Nebraska, for the sum on one thousand ninety-seven and $\frac{66}{100}$ dollars ($1,097.66) and the costs of the action, taxed at thirty and $\frac{23}{100}$ ($30.23) dollars, said judgment being rendered in an action then pending in said court, in which the
2 defendant herein was plaintiff and the plaintiff herein was defendant. A transcript of the proceedings had therein and containing said final judgment is filed herewith.

Plaintiff alleged that there is error in said proceedings and judgment in this, to wit:

First. The court erred in overruling the demurrer *ore tenus*, interposed by the defendant on the trial immediately preceding the introduction of any evidence, the ground of said demurrer being that the petition of the plaintiff failed to state a cause of action.

2nd. The court erred in admitting testimony upon the trial tending or purporting to show the rate charged by the plaintiff herein for special press dispatches, said testimony being found on pages 73, 74, 81, and 82 of the bill of exceptions.

3rd. The court erred in admitting testimony upon the trial of this cause tending or purporting to show the rate charged by the defendant, the telegraph company, for commercial messages, said testimony being found on pages 45 and 46 of bill of exceptions.

4th. The court erred in admitting testimony upon the trial tending or purporting to show the difference between the rate charged the plaintiff, The Call Publishing Company, and one The State Journal, said services being not of a similar character and not

being rendered at the same time of the day or night and not being fair comparison, said testimony being found on pages 9, 11, 12, and 35 of the bill of exceptions.

5th. The court erred in permitting to be read in evidence upon the trial of this case the testimony of one J. D. Calhoun, *and* the offer to read and the objection thereto and the ruling of the court thereon being found on page 66 of the bill of exceptions.

6th. The court erred in permitting the witness Bushnell to testify to the terms of a written contract, said testimony and the
3 objection of the defendant telegraph company and the ruling of the court being found on pages 5 and 6 of the bill of exceptions.

7th. The court erred in overruling the motion of the defendant telegraph company to strike from the testimony in the case all of the testimony of the witness Bushnell as given by him on rebuttal, said motion and the ruling of the court thereon being found on pages 191 and 192 of the bill of exceptions.

8th. The court erred in permitting the witness Bushnell being called in rebuttal to testify as to the manner in which the press report was sent by the defendant telegraph company to the said plaintiff publishing company during the years 1888 and 1889, said testimony and the objection of the defendant telegraph company thereby and the rulings of the court on the various questions beginning on page 184 of the bill of exceptions.

9th. The court erred in permitting the witness Bushnell to testify upon the trial and — rebuttal as to what he saw and did in the office of the defendant telegraph company in Omaha during the years 1888 and 1889, said testimony and the objections of the defendant, the telegraph company, thereto and the rulings of the court thereon beginning on page 185 of the bill of exceptions.

10th. The court erred in permitting the witness Bushnell being called in rebuttal to testify about press report being relayed at Omaha and the effect of such relays, said testimony and the objection of the counsel thereto and the rulings of the court thereon beginning on page 189 of the bill of exceptions.

11th. The court erred in giving to the jury the instruction requested by the plaintiff, which is numbered five; to the giving of which the defendant at the time duly excepted.

12th. The court erred in giving to the jury on its own motion instruction number one; to the giving of which defendant at
4 the time duly excepted.

13th. The court erred in giving to the jury on its own motion instruction number four; to which ruling of the court the defendant at the time duly excepted.

14th. The court erred in giving to the jury on its own motion instruction numbered five; to which ruling of the court the defendant at the time duly excepted.

15th. The court erred in giving on its own motion to the jury paragraph number six of its instructions; to which the defendant at the time duly excepted.

16th the court erred in giving to the jury on its own motion para-

graph number seven of its instructions; to the giving of which the defendant at the time duly excepted.

17th. The court erred in giving on its own motion to the jury paragraph number eight of its instructions; to which the defendant at the time duly excepted.

18th. The verdict of the jury is contrary to the second paragraph of the instructions given by the court on its own motion.

19th. The verdict of the jury is contrary to the third paragraph of the instructions given by the court on its own motion.

20th. The court erred in refusing to give to the jury instruction number one asked for by the defendant upon the trial; to which ruling the defendant duly excepted at the time.

21st. The court erred in refusing to give to the jury instruction number two asked for by the defendant at the trial, and to which ruling the defendant at the time duly excepted.

22nd. The court erred in refusing to instruct the jury, at the request of the defendant, made at the trial and upon the close of the introduction of testimony on the part of both parties hereto, to return a verdict in favor of the defendant and against the plaintiff; to which ruling of the court defendant at the time duly excepted.

23rd. Errors of law occur-ing at the trial and duly excepted to by the defendant.

24th. The verdict is not sustained by sufficient evidence.

25th. The verdict is contrary to the evidence.

26th. The verdict is contrary to law.

27th. The damages awarded by the jury are excessive, appearing to have been given under the influence of passion or prejudice.

28th. The court erred in giving paragraph number two of the instructions given by the court upon its own motion; to which defendant at the time duly excepted.

29th. The court erred in giving paragraph number three of the instructions given by the court upon its own motion; to which defendant at the time duly excepted.

30th. The court erred in overruling the motion for a new trial.

31st. The court erred in entering judgment in favor of the plaintiff below and against the defendant below.

Wherefore plaintiff prays that said judgment may be reversed and a new trial granted in said cause, and for such other, further, and different relief as justice may require.

HARWOOD, AMES & PETTIS &
H. D. ESTABROOK,
Att'ys for Plaintiff in Error.

Endorsed: 8610. In the supreme court of Nebraska. The Western Union Telegraph Company *vs.* The Call Publishing Company. Petition in error. Supreme court of Nebraska. Filed Jul- 2, 1896. D. A. Campbell, clerk.

6 7882–z–31. C.

Transcript.

Pleas in the district court, third judicial district of Nebraska, in and for the county of Lancaster, at the February, A. D. 1896, term of said court, begun and held in the city of Lincoln, in said county and State, on the 3rd day of February, in the year of our Lord one thousand eight hundred and ninety-six, and on a day therein, to wit, on the 14th day of February, A. D. 1896 (that being the 11th judicial day of said February, A. D. 1896, term of said court)—present Honorable Albert J. Cornish, judge, presiding; John J. Trompen, sheriff, and Sam. E. Low, clerk—the following proceedings, among others, were had and done, to wit:

Be it remembered that at the several times hereinafter set forth were filed in the office of the clerk of said court papers, of which the following are true and correct copies, and proceedings were had and done in the cause below named as follows, to wit:

Petition.

In the District Court of Lancaster County, Nebraska.

THE CALL PUBLISHING COMPANY, Plaintiff,
vs.
THE WESTERN UNION TELEGRAPH COMPANY, Defendant. } Petition.

1st. Comes now The Call Publishing Company, plaintiff, and for cause of action against the defendant says that it is a corporation duly organized and existing under the laws of the State of
7 Nebraska, and that it is now and has been ever since July 1st, 1888, engaged in printing and publishing in the city of Lincoln, Nebraska, a daily newspaper styled the Lincoln Daily Call.

2nd. That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of New York for the purpose of constructing, owning, and operating telegraph lines, and has complied with all the provisions of section 2 of chapter 89*a* of the Compiled Statutes of Nebraska entitled "Telegraph companies;" that as such corporation it has for more than five years last past owned and does now own and operate telegraph lines extending between and connecting the city of Lincoln, Nebraska, and the city of Chicago, in the State of Illinois, and many other cities and towns in the United States; that its business is and has been during said time to transmit, collect, and distribute telegraphic dispatches for the public for hire, and was and is a common carrier and transmitter of news and intelligence by telegraph, and for the purpose of constructing its said line has exercised the right of eminent domain under the laws of this State, and is subject to all the duties and liabilities of such common carrier and transmitter.

3rd. That ever since July 1st, A. D. 1888, the plaintiff has been and now is publishing the said newspaper in the said city of Lincoln, and during all of said period it has received from the defendant what is known as the dispatches of the Associated Press, which said dispatches consist of news and intelligence collected daily by said Associated Press at the city of Chicago, Illinois, and transmitted daily from said city over the telegraph lines of the defendant to the city of Lincoln aforesaid, and as well to all other large cities throughout the United States.

That this plaintiff paid to the said Associated Press a large sum of money for the privilege of receiving daily said dispatches
8 of news and intelligence for publication during all of the time aforesaid in its said newspaper, and still pays a large sum each month for such privilege, in addition to the sums of money hereinafter mentioned paid to the defendant for its services.

That said Associated Press and the defendant have, as plaintiff believes, and therefore charges it to be a fact, entered into a contract for their mutual benefit and profit, the exact terms of which are to plaintiff unknown, whereby the plaintiff could not procure, nor can it now procure, said dispatches, news, and intelligence except over the telegraph lines of the defendant.

That plaintiff had no other source or means for procuring such dispatches and news, as aforesaid, other than over defendant's lines.

That during all of said period the plaintiff has received said dispatches and news over the telegraph lines of the defendant, but not exceeding in amount 1,500 words each day, for which the defendant has charged, demanded, and collected of plaintiff the sum of $75.00 each month.

That the Daily Nebraska State Journal, a daily newspaper, has been printed and published in said city of Lincoln all of said period by the State Journal Company.

That prior to July 1st, 1888, the said State Journal Company had been receiving the said dispatches of said Associated Press over the telegraph lines of the defendant from Chicago, Illinois, and it still receives the same; that ever since said date it has so received the same dispatches, news, and intelligence as those received by plaintiff from said Associated Press and over the lines of the defendant.

4th. That during all of said period the defendant wrongfully and unjustly discriminated in favor of the said State Journal
9 Company and against this plaintiff, and gave to the State Journal Company an undue advantage, in this: that while the defendant demanded, charged, and collected of and from the plaintiff for the services aforesaid seventy-five dollars per month for such dispatches, amounting to 1,500 words or less daily, or at the rate of not less than five dollars per 100 words daily per month, it charged and collected from the said State Journal Company for the same, like, and contemporaneous services only the sum of $1.50 per hundred words daily per month.

Plaintiff alleges that the sum so demanded, charged, collected, and received by the said defendant for the services so rendered the

plaintiff, as aforesaid, was excessive and unjust to the extent of the amount of the excess over the rate charged the said State Journal Company for the same services, which excess was 3.50 dollars per 100 words daily per month, and to that extent it was an unjust and wrongful discrimination against the plaintiff and in favor of the State Journal Company.

That plaintiff was at all times and is now compelled to pay said excessive charges to the defendant for said services or to do without the same; that plaintiff could not dispense with such dispatches without very serious injury to its business.

That immediately upon discovering said discrimination plaintiff demanded of the defendant the repayment of the amount of said excess so collected, and protested against the further payment of the same rate that was given to the State Journal Company for the same services, all of which the defendant refused and does still refuse to do.

That by reason of the excessive and unjust rates so demanded, collected, and received from the plaintiff by the defendant for the aforesaid services and by reason of the wrongful and unjust discrimination, as aforesaid, the plaintiff has sustained damages in the sum of $52.50 per month since July 1st, 1888, amounting in the aggregate to the sum of $1,785.00 and $177.00 interest now due and unpaid.

Wherefore plaintiff prays a judgment against the defendant for the said sum of $1,962.00, with interest on $1,785.00 from May 1st, 1891, and costs.

LEESE & STEWART,
Attorneys for Plaintiff.

STATE OF NEBRASKA, } ss.
Lancaster County, }

I, Samuel D. Cox, do solemnly swear that the plaintiff is a corporation, and that I am the agent of said plaintiff, and I believe the facts stated in the foregoing petition to be true.

SAM. D. COX.

Subscribed in my presence and sworn to before me this 29th day of April, A. D. 1891.

WM. LEESE,
[SEAL.] *Notary Public.*

Endorsed: In the district court of Lancaster county. The Call Publishing Company, plaintiff, *vs.* The Western Union Telegraph Company. Petition. Law. Clerk's office, district court. Filed Apr. 29, 1891. E. R. Sizer, clerk dist. court.

Amended Answer.

In the District Court for Lancaster County, Nebraska.

THE CALL PUBLISHING COMPANY, Plaintiff,
vs.
THE WESTERN UNION TELEGRAPH COMPANY, Defendant.
} Amended Answer.

11 The defendant, The Western Union Telegraph Company, for an amended answer to the petition of the plaintiff heretofore filed herein, denies each and every allegation in said petition contained, except as hereinafter expressly admitted.

1. The defendant admits that it is a corporation, duly organized and existing under and by virtue of the laws of the State of New York, for the purpose of constructing, owning, and operating telegraph lines, and that it has complied with all the provisions of section 2 of chapter 89*a* of the Compiled Statutes of Nebraska, entitled "Telegraph companies," and admits that as such corporation it has for more than five years last past owned and does now own and operate telegraph lines extending between and connecting the city of Lincoln, Nebraska, and the city of Chicago, in the State of Illinois, and many other cities and towns in the United States, and that its business is and has been during the said time to transmit, collect, and distribute telegraphic dispatches for the public for hire.

2. The defendant further admits that said plaintiff has been and now is publishing a paper called "The Lincoln Call" in the city of Lincoln and State of Nebraska, and has received from the defendant what is known as the dispatches of the Associated Press, which said dispatches consist of news and intelligence collected daily by the Associated Press at the city of Chicago, Illinois, and transmitted daily from said city of Chicago over the telegraph lines of said defendant to the city of Lincoln aforesaid, as well as to other cities throughout the United States.

As to what arrangement the plaintiff has with said Associated Press, or whether or not said plaintiff pays to said Associated Press anything whatever for said news, this defendant has no means of knowing, and therefore denies the same.

12 3. Defendant admits that it has a contract with said Associated Press for the mutual benefit and profit of said Associated Press and this defendant, but denies that said plaintiff could not procure said news and intelligence except over the telegraph lines of this defendant.

4. This defendant further admits that said plaintiff pays to it for telegraph services each month the sum of seventy-five dollars for fifteen hundred words each way, and that there is published in said city of Lincoln a paper called the Nebraska State Journal, which said paper also received the news and dispatches of said Associated Press over the line of said defendant, for which said services the said Lincoln State Journal pays to the said defendant the sum of one hundred twenty-five dollars ($125.00).

5. This defendant denies that it has wrongfully or unjustly discriminated in favor of said State Journal Company and against said plaintiff; that it has given to said State Journal Company any undue advantage in any way whatever.

6. Further answering, this defendant avers that the charges demanded, collected, and received by this defendant for the services so as aforesaid rendered the said plaintiff are not unjust or excessive, and avers that the said paper published by the said plaintiff is an evening paper, published in the evening or afternoon of each day except Sunday, and that the said dispatches transmitted over this defendant's lines and delivered to said plaintiff, and amounting to not exceeding fifteen hundred words per day, are all of them so transmitted and delivered to said plaintiff in the daytime, and that the said sum so demanded and received by this defendant from said plaintiff for said services were and are no more than a fair and reasonable charge and compensation therefor, and were and are at
no greater rate than this defendant and other telegraph com-
13 panies have been and are accustomed to demand, charge, and
receive from other persons and corporations at the city of Lincoln and elsewere for the same and similar services.

7. Further answering said petition, this defendant avers that this defendant was prior to the 5th day of June, 1867, a telegraph company, duly incorporated and organized under the laws of the State of New York, and by its charter authorized to construct, maintain, and operate lines of telegraph in and between the various States of the Union, including the State of Nebraska; that on said 5th day of June, 1867, the said telegraph company duly filed its written acceptance with the Postmaster General of the United States of the restrictions and obligations of an act by Congress entitled "An act to aid in the construction of telegraph lines, and to secure the Government the use of the same for postal, military, and other purposes," approved July 24th, 1866; that, in accordance with the authority of said charter and the said act of Congress and by agreement with the railroad companies, the said telegraph company constructed its lines and was at all the times in said petition mentioned maintaining and operating said lines of telegraph on the various public railroads leading into or through the said State of Nebraska and city of Lincoln, to wit, the Chicago, Burlington and Quincy railroad, the Chicago & Northwestern railroad, extending from said city of Lincoln, through the States of Nebraska, Iowa, and Illinois to the city of Chicago, in said last-named State, and the Missouri Pacific railroad, extending from said city of Lincoln to the city of St. Louis, Missouri; that the said telegraph lines so running into or through said State of Nebraska and city of Lincoln connected with and extending beyond the terminii of said railroads over other railroads, making continuous lines of telegraph from the office of said company, in said city of Lincoln, to,
through, and over all the principal railroads, post-roads, and
14 military roads in and of the United States, and having
offices for the transaction of telegraph business in the departments at Washington, in the District of Columbia, and in all

the principal cities, towns, and villages in each of the United States and in the Territories thereof; that all of said railroads so reaching into and through said State of Nebraska and city of Lincoln and elsewhere in the United States are public highways, and that the daily mails of the United States are regularly carried thereon under authority of law and the direction of the Postmaster General, and that said railroads and each of them are post-roads of the United States; that said telegraph lines are also constructed under and across the navigable streams in the United States, in the State of Nebraska and in the other States of the Union, but in all cases said lines are so constructed and maintained *so* as not to obstruct the navigation of such streams and the ordinary travel on such military and post-roads; that the said telegraph company was before and during all the times mentioned in said petition and now is engaged in the business of sending and receiving telegrams over said lines for the public between its said office and the city of Lincoln and other places in other States and Territories of the United States and to and from foreign countries; also in sending telegraphic communications between the several departments of the Government of the United States and their office-s and agents, giving priority to said official telegraphic communications over all other business; and defendant aver- that said official telegrams have been and are se-t at rates which have been fixed by the Postmaster General annually since the said 5th day of June, 1867; and the defendant further avers that the subject-matter transmitted by it for the Associated Press aforesaid and delivered to said plaintiff at Lincoln, Nebraska, is collected by said Associated Press in the city of Chicago and State of Illinois, and is, as alleged in said plaintiff's petition, transmitted from said point to all points of the United States over the lines and wires of said defendant, and that the control of such commerce and the transmission of such messages is by the Constitution and law- of the United States vested in the Congress of the United States, and that the State of Nebraska, its courts and legislature, is and are without authority, power, or jurisdiction to regulate or attempt to regulate the same, and that this court is without jurisdiction to weigh, try, or determine the matter herein involved.

8. Further answering, this defendant avers that it is and at all times has been ready to transmit over its lines all dispatches directed to newspapers or private individuals or public officials with impartiality in the order in which they are received, and to use due diligence in their delivery without discrimination to any person or party to whom such message may be directed; that it is and has ever been willing to afford and has afforded the same and equal facilities to the plaintiff and all publishers of newspapers, and to furnish the dispatches collected by them for publication in any and every locality to all newspapers there published on the same conditions as to payment and delivery, but the defendant avers that it is not nor has it ever been engaged in the work of collecting news and peddling the same over its wires.

Wherefore the defendant prays that it be dismissed hence without delay and recover its costs herein expended.

HARWOOD, AMES & KELLY,
HENRY D. ESTABROOK,
Att'ys for Defendant.

STATE OF NEBRASKA, } ss:
Lancaster County, }

16 John H. Ames, being by me first duly sworn, says that he — one of the attorneys for the above-named defendant, and that affiant believes the facts stated in the foregoing answer are true.

JOHN H. AMES.

Subscribed in my presence and sworn to before me this 15th day of October, 1891.

LEOTA B. HARWOOD,
[SEAL.] *Notary Public.*

We hereby consent to the filing be defendants of the above amended answer on this date, October 15, 1891.

LEESE & STEWART,
Att'ys for Pl'ff.

Endorsed: The Call Publishing Company *vs.* The Western Union Telegraph Company. Amended answer. Clerk's office, district court. Filed Oct. 15, 1891. E. R. Sizer, *court.*

Motion.

STATE OF NEBRASKA:

In the District Court of Lancaster County.

THE LINCOLN CALL PUBLISHING COMPANY, Plaintiff,
vs.
THE WESTERN UNION TELEGRAPH COMPANY, Defendant. } Motion.

Comes now the said The Wester- Union Telegraph Company, defendant, and moves the court for and order requiring—

First. That said plaintiff forthwith pay all costs made in prosecuting proceedings in error to the supreme court of said State from a judgment heretofore rendered in this court by his
17 honor Judge Tibbetts, the amount of which said costs, from an inspection of the record herein, is shown to be $—, and the amount of which said costs the said plaintiff in any event will be compelled to pay, and which it should forthwith be required to pay as a condition precedent to the further prosecution of this cause.

Second. For a further order requiring said plaintiff to furnish security for costs, for that said plaintiff is an insolvent corporation, having no property or effects out of which the costs of this action could in any event be realized, and in support of this said motion

the defendant respectfully refers to the affidavit of Henry D. Estabrook now on file.

ESTABROOK & DAVIS,
JOHN H. AMES,
Att'ys for Def't.

Endorsed: In the district court. The Lincoln Call Publishing Company, plaintiff, *vs.* The Western Union Telegraph Company, defendant. Motion. Clerk's office, district court. Filed Feb. 8, 1896. Sam. E. Low, clerk district court.

Affidavit.

STATE OF NEBRASKA:

In the District Court for Lancaster County.

THE LINCOLN CALL PUBLISHING COMPANY, Plaintiff, *vs.* THE WESTERN UNION TELEGRAPH COMPANY, Defendant. } Affidavit.

STATE OF NEBRASKA, *Lancaster County,* } *ss:*

Henry D. Estabrook, being first duly sworn, on oath says
18 that the plaintiff herein, The Lincoln Call Publishing Company, is a corporation duly organized under the laws of the State of Nebraska, and is totally insolvent, having no assets or effects of any description out of which a judgment against it in any sum whatever could be realized or collected; that it is a corporation in name only, and has not for more than a year last past done or transacted any business whatever; that some time in December, 1894, the said plaintiff sold and transferred all of its property, consisting of printing machinery, type, presses, fixtures, etc., to a corporation known as the Call Publishing and Printing Company; that if upon final trial and judgment herein it should be adjudged that the plaintiff's action be dismissed hence without day, and that the defendant herein recover its costs, there is no property belonging to said plaintiff out of which said judgment could be realized.

The foregoing affiant charges to be true upon information and belief.

HENRY D. ESTABROOK.

Subscribed in my presence and sworn to before me this 7th day of Feb'y, 1896.

EDWIN CANACK,
Notary Public.

[SEAL.]

Endorsed: In the district court. The Lincoln Call Publishing Company, plaintiff, *vs.* The Western Union Telegraph Company, defendant. Affidavit. Clerk's office, district court. Filed Feb. 8, 1896. Sam. E. Low, clerk district court.

Journal Entry.

That on the 11th day of February, A. D. 1896 (that being the 8th day of said February, A. D. 1896, term of said court),
19 were had and done the following proceedings, as appears upon Court Journal "20," at page "80," to wit:

THE CALL PUBLISHING COMPANY
vs.
THE WESTERN UNION TELEGRAPH COMPANY. } 7882. Z, 31.

Now, on this day, came the parties hereto, by their attorneys, and this cause now comes on to be heard upon the motion of the defendant to require the plaintiff to pay the costs of this action as a condition precedent to the further prosecution of this case, and, after due consideration, the court doth overrule said motion; to which the said defendant duly excepts.

And, this cause now coming on for trial, came the following-named persons as jurors herein, to wit, Walter Whitaker, Henry Brandt, S. Schenk, A. T. Hall, W. J. McClain, Walter Deitz, G. Abbink, Herman Freese, Joseph Foley, W. J. Fowler, T. J. Keevan, and August Hagan, all of the regular panel, who were duly impanelled and sworn herein according to law, and the trial of this cause proceeded; and, after hearing the testimony of witnesses adduced in part only and the hour of adjournment being at hand, the said jury are duly admonished by the court and excused until tomorrow morning at nine o'clock, to which time further proceedings herein are continued.

Journal Entry.

That on the 12th day of February, A. D. 1896 (that being the ninth day of said February, A. D. 1896, term of said court), were had and done the following proceedings, as appears upon Court Journal "20," at page "87," to wit:

20 THE CALL PUBLISHING COMPANY
vs.
THE WESTERN UNION TELEGRAPH COMPANY. } 7882. Z, 31.

Now, on this day, again came the parties hereto, by their attorneys, and also came the jury heretofore impanelled and sworn herein, and the trial of this cause proceeded; and, after hearing the further testimony of witnesses adduced and the hour of adjournment being at hand, the said jury are duly admonished by the court and excused until tomorrow morning at nine o'clock, to which time further proceedings herein are continued.

Instructions by the Court.

In the District Court of Lancaster County, Nebraska.

THE CALL PUBLISHING COMPANY, Plaintiff,
vs.
THE WESTERN UNION TELEGRAPH COMPANY, Defendant.
} Instructions by the Court.

I.

The plaintiff in its petition alleges that the defendant owns and operates telegraph lines extending between and connecting the city of Chicago, State of Illinois, and the city of Lincoln, State of Nebraska; that it is engaged in the business of transmitting, collecting, and distributing telegraphic dispatches for the public for hire, and as such is a common carrier; that since July 1, 1888, the plaintiff has been publishing a newspaper in the city of Lincoln, and has received from the defendant what is known as the dispatches of the Associated Press, which consists of news and
21 intelligence collected daily by the said Associated Press and transmitted from the said city of Chicago, over the telegraph lines of the defendant, to the city of Lincoln and other cities in the United States; that plaintiff paid to the said Associated Press a large sum of money for the privilege of receiving daily said dispatches; that plaintiff had no other source or means for procuring such dispatches other than over defendant's line, and plaintiff has received during said period the said dispatches, not exceeding in amount 1,500 words each day, and for which the defendant has charged, demanded, and collected of plaintiff the sum of $75.00 each month; that during said time the Daily Nebraska State Journal has been published in said city of Lincoln by the State Journal Company, and that the defendant has wrongfully and unjustly discriminated in favor of the said State Journal Company and given to the said State Journal Company an undue advantage over plaintiff, in this: that while defendant has demanded and collected from plaintiff $75.00 per month for the dispatches above referred to, amounting to 1,500 words or less, at the rate of not less than $5.00 per hundred words daily per month, they charged and collected from said State Journal Company for the same, like, and contemporaneous services only the sum of $1.50 per hundred words daily per month; that the sum demanded and received by the defendant for the services so rendered the plaintiff was excessive and unjust to the extent of the amount of the excess over the rate charged the State Journal Company for the same services, which excess amounted to $3.50 per hundred words daily per month, and was a discrimination against the plaintiff and in favor of the State Journal Company; that plaintiff, upon discovery of such discrimination, demanded of defendant the repayment of the amount paid as excessive payment and protested against the further payment of same
22 and demanded that it be accorded the same rate that was given the State Journal Company for the same service, which

demands were by the defendant refused; that by reason of the excessive and unjust rate so demanded and received by defendant and by reason of the unjust and wrongful discrimination the plaintiff has sustained damages in the amount of $52.50 per month, in the aggregate of $1,785.00, and interest, for which plaintiff prays judgment.

Defendant in its answer admits the business it is engaged in as alleged in the petition; that plaintiff pays defendant for telegraphic services each month the sum of $75.00 for 1,500 words each day, and that the Lincoln State Journal Company pays to the defendant the sum of $125.00 per month; defendant denies the discrimination in favor of the State Journal Company and against the plaintiff, or that it has given the State Journal Company any undue advantage whatever. Defendant alleges that its charges collected and received from the plaintiff, as aforesaid, are not unjust or excessive; that the paper published by plaintiff is an evening paper, published in the evening or afternoon of each day except Sunday, and that the said dispatches transmitted over this defendant's lines and delivered to the plaintiff are all transmitted and delivered in the daytime, and that the said sum so demanded and received by defendant from plaintiff is no more than a fair and reasonable charge for the services rendered, and no greater than this and other telegraph companies have been accustomed to demand and receive for the same and similar services.

Defendant further alleges that the subject-matter transmitted by it to the plaintiff and to the State Journal Company and other parties as named in the petition is transmitted for the Associated Press under a contract between defendant and the said Associated Press and delivered to the plaintiff at Lincoln.

Given. Defendant excepts.

23 II.

You are instructed that not every discrimination in rates charged by a telegraph company is unjust. In order to constitute an unjust discrimination there must be a difference in rates under substantially similar conditions as to service; the rate charged must be a reasonable rate; under like conditions it must render its services to all patrons on equal terms; it must not so discriminate in its rates to different patrons *so* as to give one an undue preference over another.

Given. Def't excepts.

III.

It is not an undue preference to make one patron a less rate than another where exists differences in conditions affecting the expense or difficulty in performing the services which fairly justify the difference in rates, and where it is shown that a difference in rate exists, but there is also a substantial difference in conditions affecting the difficulty or expense of performing the service, no cause of action arises without evidence to show that the difference in rates is disproportionate to the difference in conditions.

Given. Def't excepts.

IV.

In this action there is shown to exist, not only, on the one hand, a difference in the rates charged to the patrons of the telegraph company, the Call Publishing Company and the State Journal Company, but, on the other hand, also a difference in the conditions under which the telegraph services were rendered to the two companies, and the question that you have particularly to direct your attention to is how far this difference in condition justified
24 the difference in rates charged; to what extent, if any, the difference in rates charged the rival companies was disproportioned to the difference in conditions under which the services were rendered. If you find such dispor portions to have existed, and that by reason thereof the amount charged the plaintiff was in excess of what a reasonable rate would be under the circumstances, then you are to find, if facts have been presented to you by which you can find, the amount of such excess as the amount which the plaintiff would be entitled to recover.

Given. Def't excepts.

V.

The burden of proof is upon the plaintiff to show by a preponderance of the evidence the existence of the discrimination claimed by it; also that the difference in conditions shown are disproportionate to the difference in charges made, as well as all the other material allegations of its petition.

Given. Def't excepts.

VI.

You should approach this case, not in an attitude as if you were charged with the duty of determining rates for the telegraph company. Its stock is the property of private individuals, who have elected officials for that purpose. They are there to manage the affairs of their corporation in their own way, so long as what they do is within reason. Courts of law are maintained to correct abuses, and it is only after the plaintiff has convinced you that the telegraph company has abused its privileges that the court will interfere. The telegraph company is a common carrier, and is said to exercise quasi-public functions. On the other hand, the Call Publishing Company has certain legal rights. It embarks in an
25 enterprise in the city of Lincoln. It has for a competitor the State Journal Company, and perhaps others. In its race for success it ought — be unfairly handicapped. For the purpose of getting the news, both it and the Journal use the Associated Press dispatches. In fixing its charges to these two competing companies for these dispatches it is the duty of the telegraph company not to unjustly discriminate in favor of either, as explained to you in these instructions; and, as before stated to you, if the plaintiff has been able to convince you that the defendant has so discriminated, then the telegraph company would be required to answer to the plaintiff in whatever damages the plaintiff has — you it has suffered.

Given. Def't excepts.

VII.

In arriving at your verdict you should consider what-ever evidence there is going to show charges made by the telegraph company to other persons or in other places for like services under like conditions; the increased cost of operating plant occasioned by increased work, if any; the difference of volume of business between the telegraph company day and night work, as it would be a reasonable discrimination for the company to make this difference the basis for a difference in charges; the difference in charges between day and night services generally, as shown by the evidence; also the difference in the character of the night and day work; time required to perform it, as shown by the evidence; the charges made by the company for other services unless made under circumstances and conditions different from those under consideration, so as not to furnish a fair criterion as to charges; the general operating expenses of the company as affected by rates charged, as well as all other facts before you which may aid you in arriving at a conclusion. However, this is to be understood: that for the
26 plaintiff to recover it must show the discrimination; that the discrimination was unjust, as explained in these instructions; and, further, you must be able from the evidence furnished you to measure the damages, if any, sustained by the plaintiff. You are not to fix the damages in any haphazard manner, nor by mere speculation, but by reasons sustained by the evidence and showing in a reasonable way the amount thereof.

Given. Def't excepts.

VIII.

If you find for the plaintiff, then the measure of its recovery will be the excess of rate paid by it above what would have been the lawful rate, as explained in these instructions, together with interest at the rate of seven per cent. from the date of such payment.

Given. Def't excepts.

ALBERT J. CORNISH, *Judge.*

Endorsed: The Call Publishing Co. *vs.* The Western Union Tel. Co. Instructions by the court. Clerk's office, district court. Filed Feb. 13, 1896. Sam. E. Low, clerk district court.

Instruction Requested by Plaintiff.

You are instructed that if you find from the evidence that the defendant wrongfully discriminated against the plantiff, and if you further find from the evidence that plaintiff was wholly dependent upon defendant for the transmission and delivery of such telegraphic communications, and was compelled to pay the rate demanded and charged by defendant for such services or do without such services, and the plaintiff paid the same without knowl-
27 edge of the amount paid by its competitor, if any existed, then such payment by the plaintiff would not be deemed a

voluntary payment, nor would any protest be required on the part of plaintiff against such payment.

Given. Def't excepts.

Endorsed: The Call Pub. Co. *vs.* The Western Union Tel. Co. Plaintiff's inst. given. Clerk's office, district court. Filed Feb. 13, 1896. Sam. E. Low, clerk district court.

Instructions Requested by Defendant.

V.

Given at request of defendant.

The jury are instructed that according to the undisputed testimony it is established that there are differences in cost and facilities of the said defendant telegraph compony between the handling of so-called commercial business and so-called press reports, and that such differences in conditions would justify the defendant telegraph company in making a difference of rate between the transmission of commercial messages and press reports.

Given.

VI.

The jury are instructed that the defendant telegraph company is not presumed to have unjustly discriminated against any of its patrons and in favor of certain other of its patrons, but, on the contrary, it is presumed to have properly and justly established its rates according to the various kinds of service it may be called upon to render, considering its duty to the public and to its stockholders.

Given.

28 Endorsed: The Call Publ. Co. *vs.* The Western Union Telegraph Co. Defendant's instructions given. Clerk's office, district court. Filed Feb. 13, 1896. Sam. E. Low, clerk district court.

Instructions Asked by Defendant Refused.

I.

The jury are instructed that under the law and the evidence produced in this case the plaintiff is not entitled to recover. You will therefore return a verdict for the defendant.

Refused. Defendant excepts.

II.

The jury are instructed that the plaintiff must establish by a preponderance of the evidence the fact that the defendant telegraph company unjustly discriminated against it and in favor of the State Journal Company in the transmission of dispatches for the same, like, and contemporaneous service.

Refused. Defendant excepts.

III.

The jury are instructed that under the undisputed facts in this case it is established that the services rendered by the defendant telegraph company for the Lincoln State Journal were different from those rendered to the Call Company in time, quantity, and cost to the said telegraph company, and that your verdict cannot be based upon any comparison of these respective premises.

Refused. Def't excepts.

IV.

The jury are instructed that according to the undisputed facts in this case it is established that there are various differences in cost of transmission to the def't telegraph Co. and in facilities
29 for handling press reports by the defendant telegraph company between day and night, and that said conditions would justify the defendant telegraph company in making a difference in rates between the two kinds of services.

Refused. Def't excepts.

Endorsed: Call Pub. Co. *vs.* Western Union. 5 instructions of defendants refused. Clerk's office, district court. Filed Feb. 13, 1896. Sam. E. Low, clerk district court.

Instructions Asked by Plaintiff Refused.

CALL PUBLISHING COMPANY, Plaintiff,
vs.
WESTERN UNION TELEGRAPH COMPANY, Defendants.
} Instructions Asked by Plaintiff.

You are instructed that a telegraph company must charge for its services no more than a reasonable rate. Under like conditions it must render its services to all patrons on equal terms, and it must not so discriminate in its rates to different parties as to give one an undue preference over another. Any patron wrongfully discriminated against would have a right of action against such company by reason of any such wrongful discrimination. When it is shown that a difference in rates exists, but that there is also a substantial difference in conditions affecting the difficulty or expense of performing service, then to show a cause of action on the part of the patron it must appear from the evidence that the difference in rates is disproportionately greater than the difference in the conditions.

Refused.

30 You are instructed that if you find from the evidence that the conditions affecting the expense and difficulty of performing the service for the plaintiff and the State Journal Company were different, then you should determine from the evidence whether the difference in rates charged the plaintiff and said State Journal is disproportionate to the difference in such conditions. If you find that after allowing for all such differences in conditions that the

rate charged plaintiff was disproportionately greater than that charged the State Journal, then that would constitute a wrongful discrimination.

Refused.

In determining to what extent, if any, defendant would have been justified in charging a greater rate for transmitting day news report than night news report, it is proper for you to consider the difference in rates that the defendants has maintained between day and night service generally, so far as shown by the evidence.

Refused.

If you find for the plaintiff, then the measure of its recovery will be the excess of the rate paid by it for the services it received above what would have been a reasonable rate for such services as compared with the rate charged the State Journal for the news report furnished it after allowing for any differences in conditions in the performance of such services affecting the expense or trouble thereof. To any excess you may so find paid, you should add thereto interest, at the rate of seven per cent., from the date of such payments.

Refused.

You are instructed that it was the duty of the defendant to not only render the services in question to the plaintiff at a rate
31 of cha*r*ges reasonable in themselves, but it was also bound to make its charges to plaintiff for such services as low as the rate of charges to the State Journal for services rendered in transmitting the news report furnished it, after allowing for any difference in conditions affecting the trouble or expense incurred in rendering such services.

Refused.

Endorsed: The Call Pub. Co. *vs.* The Western Union Tel. Co. Plaintiff's instructions refused. Clark's office, district court. Filed Feb. 13, 1896. Sam. E. Low, clerk district court.

Journal Entry.

That on the 14th day of February, A. D. 1896 (that being the 11th day of said February, A. D. 1896, term of said court), were had and done the following proceedings, as appears upon Court Journal "20," at page "101," to wit:

THE CALL PUBLISHING COMPANY
vs.
THE WESTERN UNION TELEGRAPH COMPANY. } 7882. Z. 31.

Now, on this day, again came the parties hereto by their attorneys, and also came the jury heretofore impanelled and sworn herein, with their sealed verdict in writing, signed by their foreman, and say:

"THE STATE OF NEBRASKA, } ss:
Lancaster County, }

February Term, A. D. 1896, to wit, February 13th, 1896.

THE CALL PUBLISHING COMPANY, Plaintiff,
vs.
THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

We, the jury, duly impanelled and sworn in the above-entitled cause, do find for the plaintiff and assess the amount of its damages at the sum of $1,097.66.

S. SCHENCK, *Foreman.*"

32 It is therefore considered and adjudged by the court that the said plaintiff, The Call Publishing Company, do have and recover of and from the said defendant, The Western Union Telegraph Company, the said sum of one thousand ninety-seven and $\frac{66}{100}$ ($1,097.66) dollars damages, as assessed by the jury, with interest thereon, at the rate of 7% per annum, from this date until paid, together with the costs of this action, taxed at $30.23.

Motion for New Trial.

In the District Court of Lancaster County, State of Nebraska.

THE CALL PUBLISHING COMPANY, Plaintiff, *vs.* THE WESTERN UNION TELEGRAPH COMPANY, Defendant. } Motion for a New Trial.

Comes now the defendant and moves the court for a new trial of this case and to set aside the verdict heretofore rendered in this case at the February, 1896, term of this court for the following reasons:

1st. Because the court erred in overruling the demurrer *ore tenus*, interposed by the defendant at the beginning of the trial and just preceding the introduction of any evidence, to the introduction of any evidence on the part of the plaintiff, said demurrer *ore tenus* being based upon the ground that the petition of the plaintiff failed to state a cause of action; to which ruling of the court defendant at the time duly excepted.

2nd. Because the court erred in giving to the jury the instruction requested by the plaintiff, which is numbered five, to the giving of which the defendant at the time duly excepted.

33 3rd. Because the court erred in giving to the jury on its own motion instruction number one; to the giving of which defendant at the time duly excepted.

4th. Because the court erred in giving to the jury on its own motion instruction number four; to which ruling of the court the defendant at the time duly excepted.

5th. Because the court erred in giving to the jury on its own

motion instruction number five; to which the defendant at the time duly excepted.

6th. Because the court erred in giving on its own motion to the jury paragraph number six of its instructions; to which the defendant at the time duly excepted.

7th. Because the court erred in giving to the jury on its own motion paragraph number seven of its instructions; to the giving of which the defendant at the time duly excepted.

8th. Because the court erred in giving on its own motion to the jury paragraph number eight of its instructions; to which the defendant at the time duly excepted.

9th. Because the verdict of the jury is contrary to the second paragraph of the instructions given by the court on its own motion.

10th. Because the verdict of the jury is contrary to the third paragraph of the instructions given by the court on its own motion.

11th. Because the court erred in admitting in evidence, over the objection of the defendant made at the time, any and all testimony tending to show or purporting to show the rate charged by the defendant for special press dispatches.

12th. Because the court erred in admitting any and all testimony purporting or pretending to show the rate charged by this defendant for commercial messages; to which the defendant at the time duly excepted.

13th. Because the court erred in admitting any and all
34 testimony pretending to show or purporting to show any difference or distinction between the rates charged the Journal Company and the plaintiff herein, the services not being similar; to which ruling of the court the defendant at the time duly excepted.

14th. Because the court erred in refusing to give instruction number one asked for by the defendant upon the trial; to which ruling the defendant duly excepted at the time.

15th. Because the court erred in refusing to give to the jury instruction number two asked for by the defendant at the trial; to which ruling the defendant at the time duly excepted.

16th. Because the court erred in refusing to instruct the jury at the request of the defendant, made at the trial and upon the close of the introduction of testimony on the part of both parties hereto, to return a verdict in favor of the defendant and against the plaintiff; to which ruling of the court the defendant at the time duly excepted.

17th. Because of errors of law occurring at the trial and duly excepted to by the defendant.

18th. Because the verdict is not sustained by sufficient evidence.

19th. Because the verdict is contrary to the evidence.

20th. Because the verdict is contrary to law.

21st. Because the damages awarded by the jury are excessive, appearing to have been given under the influence of passion or prejudice.

22nd. Because the court erred in giving paragraph number two of the instructions given by the court upon its own motion; to which defendant at the time duly excepted.

23rd. Because the court erred in giving to the jury the third paragraph of the instructions given by the court upon its own motion; to which defendant at the time duly excepted.

HARWOOD, AMES & PETTIS AND
H. D. ESTABROOK,
Attorneys for Defendant.

35 Endorsed: In district court for Lancaster county. Call Publishing Co., plaintiff, *vs.* Western Union Telegraph Co., defendant. Motion for a new trial. Clerk's office, district court. Filed Feb. 15, 1896. Sam. E. Low, clerk district court.

Motion for Judgment Non Obstante Verdicto.

In District Court, Lancaster County.

CALL PUBLISHING COMPANY, Pl'ff,
vs.
WESTERN UNION TELEGRAPH COMPANY, Def't. } 7882. Z, 31.

Defendant moves the court for an order herein granting and giving to the defendant a verdict and judgment in its favor and against plaintiff, and this notwithstanding the verdict of the jury rendered herein at the February, 1896, term of this court.

HARWOOD, AMES & PETTIS,
H. D. ESTABROOK,
For the Motion.

Feb. 15, 1896.

Endorsed: Call Publishing Co. *vs.* Wester- Union Telegraph Co. Motion for judgment *non obstante verdicto.* Clerk's office, district court. Filed Feb. 15, 1896. Sam. E. Low, clerk district court.

Journal Entry.

That on the 2nd day of March, A. D. 1896 (that being the 24th day of the February, A. D. 1896, term of said court), were had and done the following proceedings, as appears upon Court Journal "20," at page "216," to wit:

THE CALL PUBLISHING COMPANY
vs.
THE WESTERN UNION TELEGRAPH COMPANY. } 7882. Z, 31.

36 This cause now comes on to be heard upon the motion of the defendant to set aside the verdict of the jury and judgment rendered thereon, and for a new trial herein, and is submitted to the court; on due consideration whereof the court doth overrule said motion; to which the said defendant duly excepts, and forty days from the rising of the court are hereby given it to reduce its exceptions to writing.

And this cause now comes on further to be heard upon a motion

of the defendant for judgment herein in favor of the defendant and against the plaintiff, notwithstanding the verdict of the jury, and is submitted to the court; on due consideration whereof the court doth overrule said motion.

Journal Entry.

That on the 6th day of April, A. D. 1896 (that being the fifty-fourth day of said February, A. D. 1896, term of said court), were had and done the following proceedings, as appears upon Court Journal "21," at page "530," to wit:

It is hereby ordered that all causes, matters, and motions now pending in this court and not otherwise disposed of be, and the same hereby are, continued until the next term of this court.

This February term of this district court was begun on the 3rd day of February, A. D. 1896, and continued from day to day and from time to time by regular adjournment until this 6th day of April, A. D. 1896, and is now adjourned without day.

Certificate.

THE STATE OF NEBRASKA, } ss:
Lancaster County, }

37 I, Sam. E. Low, clerk of the district court, third judicial district of Nebraska, in and for said county, do hereby certify that the above and foregoing are true and correct copies of the petition, amended answer, motion to require plaintiff to pay costs and furnish security for costs, affidavit of H. D. Estabrook in support of motion, instructions given by the court, instructions requested by plaintiff and given, instructions requested by defendant and given, instructions asked by defendant and refused, instructions asked by plaintiff and refused, motion for a new trial, motion for judgment *non obstante verdicto*, with all endorsements on each; ruling of our said court on motion to compel plaintiff to pay costs, ruling of the court on motion for a new trial, and ruling on motion to set aside verdict of the jury, together with all proceedings of trial, final judgment of this court, and adjournment of said court *sine die*, in a cause therein wherein The Call Publishing Company is plaintiff and The Western Union Telegraph Company is defendant, as the same appears fully upon the records and files of this court and now in my charge remaining as clerk aforesaid.

I hereby further certify that hereto attached is the original bill of exceptions filed in said cause in said court on the 8th day of May, A. D. 1896, and which is made a part of the record herein.

In testimony whereof I have hereunto set my hand officially and attached the seal of said court, at Lincoln, this 23 day of June, A. D. 1896.

SAM. E. LOW, *Clerk D. C.*,
[SEAL.] By FRED W. HOUTZ, *Deputy.*

Trans. fee, $11.25.
Paid by E. F. Pettis, attorney for def't.

38 Endorsed: 8610. Western Union Tel. Co. *v.* Call Pub. Co. Petition in error. Supreme court of Nebraska. Filed July 2, 1896. D. A. Campbell, clerk.

In the District Court of Lancaster County, Nebraska.

THE CALL PUBLISHING COMPANY, Plaintiff,
vs.
THE WESTERN UNION TELEGRAPH COMPANY, Defendant.
} Defendant's Bill of Exceptions.

Appearances: For plaintiff, William Leese and J. M. Stewart; for defendant, H. D. Estabrook and John H. Ames.

Received the within bill of exceptions for examination and amendment this 22 day of April, 1896.

J. M. STEWART,
Attorney for Plaintiff.

LINCOLN, NEBRASKA, —— —, 1896.

I herewith return the within bill of exceptions and suggest as amendment that the evidence of J. D. Calhoun, as given by him on former trial when recalled, is not contained herein, & that same was in evidence o*b* this trial, should be included in this proposed bill of exceptions, & object to same without it, & that same does not contain all the evidence.

JOHN M. STEWART,
Attorney for Plaintiff.

39 Received above bill of exceptions with proposed amendment, & find evidence of J. D. Calhoun in full in bill, & we waive objection on that acct. & waive notice of time of settling such bill by judge.
May 6, 1896.

JOHN M. STEWART,
Att'y for Plaintiff.

May 6, '96.—We have no objection to proposed amendment.

AMES & PETTIS,
For Defendant.

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40 Be it remembered that at the February, 1896, term of the Lancaster county, Nebraska, district court, to wit, February 11, 1896, that being one of the days of said term, on the hearing of the cause of The Call Publishing Company *versus* The Western Union Telegraph Company, before the Honorable Albert J. Cornish, judges, the above-named plaintiff and the above-named defendant, each to maintain the issues of their respective parts, adduced testimony, and all of said testimony, the objections thereto, with the grounds therefor, all the rulings of the court on such objections, and all of the objections to such rulings made and taken at the time having been by the defendant reduced to writing in this its bill of exceptions, and the same having been served on the attorney for the plaintiff for examination and amendment, the said defendant now prays the honorable judge, before whom said cause was heard, that this bill of exceptions may be settled, allowed, signed, sealed, and made a part of the record of said cause in said court.

41 H. M. BUSHNELL, being called and duly sworn on behalf of the plaintiff, testified as follows:

Examined by Mr. STEWART:

Q. Where do you reside, Mr. Bushnell?
A. In this city—Lincoln, Nebraska.
Q. How long have you resided in Lincoln?
A. Since 1886.
Q. You were formerly connected with the plaintiff, The Call Publishing Company?
A. I was.
Q. In what way?
A. I was one of the stockholders and officers in the company.
Q. What did that company do—what was its business?

A. Printed and published a newspaper—the Daily and Weekly Call.

Q. How long did it publish that paper?

A. The daily commenced the first of July, 1888, and the paper has been in existence ever since the time.

Q. Did the Call Publishing Company succeed some other company or paper?

A. The Call Publishing —, when organized as a company, purchased the Daily State Democrat, and changed the name of the paper to the Daily Call.

42 Q. What, if anything, did the Call receive from the State Democrat entitling them to the Associated Press dispatches?

A. We received the franchise for the day report of the Associated Press.

Q. What did that report consist of?

Defendant objects, because the franchise or what he pays for it will show it if in writing.

Mr. Estabrook requests leave to ask a few preliminary questions to lay the foundation.

ESTABROOK:

Q. Mr. Bushnell, was that contract in writing?

A. What contract?

Q. The contract for the Press Associated reports?

A. It was in the form of a receipt.

Q. Showing to what you was entitled?

A. Showing that we had paid so much money, or the parties who assigned it to us had paid so much money for the use of the press franchise.

Q. Is that all the writing you had?

A. I think it was. It was so long back. I think that was the form of it in a general way.

Defendant objects to the testimony without the introduction of the paper itself as the best proof.

43 Mr. ESTABROOK:

Q. Mr. Bushnell, the paper which you succeeded, did they have any contract with the Western Union?

A. Not to my knowledge.

Q. You found them receiving a certain number of words and paying a certain amount, and you continued in that?

A. We found at the end of the first month after taking it that the Western Union handed us a bill for so much.

Q. As per contract?

A. No written contract.

Q. Prior to your purchasing the paper, didn't you make inquiries as to what they had to pay the Western Union?

A. We knew what Mr. Calhoun had to pay.

Q. Had to pay by agreement or contract?

A. Don't know whether he had a contract or not; know that he paid at the end of every month $75.

Q. Don't know whether that was in writing or not?

A. No; I don't.

Mr. ESTABROOK: The plaintiff now objects to the question for the reason no foundation has been laid.

Overruled. Exception.

(Answer to last question asked by Mr. Stewart.) It consisted of some eight to fourteen hundred words of telegraph news. The maximum, I think, was fourteen hundred that we were entitled to.

Q. And what telegraph line did you get that service over?

44 A. Over the Western Union.

Q. What time of the day was it furnished?

A. Well, from about noon until three o'clock to half-past three. If the wires were busy it might come as late as four.

Q. How long did you receive that service?

A. We received it from the time we entered the publication of the paper, the first of July, 1888, up to two years ago.

Q. And you say you paid for it $75.00 a month during that period?

A. $75 a month; that was the telegraph toll.

Q. How often did you pay that?

A. Monthly. At the end of each month; before the 10th—between the 1st and the 10th.

Q. Who did you pay it to?

A. We paid it to—it was collected by the local office.

Q. The local Western Union office?

A. The local Western Union office.

Q. You know of another newspaper published here by the name of the State Journal?

A. Yes, sir.

Q. Was that published during the period that you published the Daily Call?

A. It was.

Q. When was the State Democrat started?

A. Why, I can't give the date. It was started before I came to Lincoln, some time.

45 Q. Do you know when it began getting the daily report of the Associated Press?

A. I do.

Q. When?

A. In June, 1887.

Q. Now, referring to the State Journal again, you know what service it received from the Western Union in the way of news reports?

A. Yes, sir.

Mr. ESTABROOK:

Q. Mr. Bushnell, do you know as a matter of fact whether the

Journal Company ever received any service from the Western Union?

A. I do.

Q. By virtue of a contract with the Western Union?

A. No, I don't. I never saw any contract.

Q. Then the service of the Western Union wasn't for the Journal, was it?

A. I know that the Journal received both the day and the night report. They received the night, and also the morning.

Q. By virtue of a contract between the Western Union and the Press Association, wasn't it?

A. I don't know. I couldn't say that.

Q. All you know is that they received a report?

A. I know they received a day and a night report from the Western Union.

46 Mr. STEWART:

Q. You know what that night report consisted of?

A. I do.

Q. What was it?

Mr. ESTABROOK (addressing Mr. Stewart): How do you mean—by the number of words?

Mr. STEWART: Yes, sir.

Defendant objects, because the contract will show. Overruled. Exception.

A. It consisted of from five to seven thousand words of telegraph matter.

Q. What time was it received here at Lincoln—during what hours?

A. That part, from eight to fourteen hundred words, corresponding to that which we received, was received at the same time that we received it. The remainder of it during the night, up until probably two o'clock in the morning.

Q. And what was the amount of the night news report as compared with the day report?

A. Well, I should think about five to one.

Q. That is, the night report was five times the amount of the day report?

A. Yes, sir.

Mr. ESTABROOK: The defendant moves to strike out this testimony, because it is admitted in the answer what the rate ratio is.

47 Mr. ESTABROOK: The defendant will admit that it charged for its services to the Journal Company at the rate of $1.50 per hundred words per month, and it charged the Call Publishing Company at the rate of $5.00 per hundred words per month.

Mr. ESTABROOK: The defendant moves to strike out the evidence of this witness as incompetent and immaterial.

Overruled. Exception.

Mr. STEWART:

Q. During the period prior to the time the Democrat began taking the day report, state if you know what services the Journal received then.

Defendant objects as incompetent, irrelevant, and immaterial under the pleadings in this case. Overruled. Exception.

A. I do.

Q. State what it was.

A. Why, prior to the time that the State Democrat received it the Journal received both the day and the night reports the same as they did after the Democrat received it and the Call.

Q. Mr. Bushnell, when did you first learn of the rate that the defendant was furnishing this service to the State Journal for?

48 Defendant objects as assuming an answer which has not been given, and as incompetent, irrelevant, and immaterial, and, further, because it is admitted that the contract between the association and the State Journal is in writing. Overruled. Exception.

A. Well, I learned of the rate a good while ago, before this suit was commenced, but I didn't do anything until I knew absolutely certain—when I knew absolutely certain. When I first learned to a certainty was a short time before this suit was commenced, in '91.

Q. What did you do then in regard to the matter?

A. Why, we demanded the company—demanded through Mr. Cox—that it be righted.

Q. What did the defendant do?

A. The defendant refused to do anything in the matter—that is, the local people who we made the demand upon.

Q. That, you say, was a short time before you commenced this suit?

A. Yes, sir.

Q. Now, was there any other wire or way by which you could get this news service to Lincoln except over the Western Union?

Defendant objects as incompetent, irrelevant, and immaterial. Overruled. Exception.

A. No, sir.

Q. Were you acquainted at any time with the methods of
49 the Press Association—method of the Press Association doing business—as far as furnishing their reports to newspapers was concerned?

Defendant objects as immaterial. Overruled. Exception.

A. Why, that was so general, I presume I was.

Q. Now, state if you can what their method was in regard to furnishing the night news report, such as the Journal received, to more than one newspaper in a State at a given point.

Defendant objects as irrelevant and immaterial. Overruled. Exception.

A. Why, I can't answer that question except from observation As a general rule, a press franchise is supposed to be exclusive.

Mr. ESTABROOK: I object to that——

Q. I will ask you what means you have of learning this?

A. No means of knowing absolutely in general; in particularly to this town, of course I did.

Q. State, if you know, what their rule was here in regard to furnishing the news report to more than one paper.

Defendant objects as irrelevant and immaterial. Sustained. Exception.

Q. Are you acquainted with J. D. Calhoun, who testified in the former trial of this case?

A. I am.

Q. You know where he resides?

50 A. He is living in Tampa, Florida.

Q. He is there now, so far as you know, is he?

A. He is there now.

Q. How long since he left this city?

A. Why, it can't be far from two years ago, I think.

Cross-examination.

By Mr. ESTABROOK:

Q. You were employed prior to your purchase of the Call on the Journal?

A. No, sir.

Q. You say you know how many words that they received of the day-and-night report, the Journal, from '88 down?

A. Yes, sir.

Q. How do you know it?

A. Well, I know it one way. I know it by that.

Q. Is there more than one way?

A. I know from what Mr. Hathaway has told me, the manager, and Mr. Calhoun.

Q. These men are still living?

A. Yes, sir.

Q. From what other way do you know it?

A. From what the manager of the telegraph company told me.

Q. He is still living, isn't he?

A. I suppose so; don't know, however.

51 Q. So you say you know it because somebody told you?

A. Know, in addition, because Mr. Cox and I have figured it from the columns of the paper at different times.

Q. How do you know which are special and which are Associated?

A. Because specials are always marked.

Q. How did you know but what they were manufactured in the office or copied from some other paper in Omaha or some other place?

A. Any paper that pretends to publish the news of the day copies some matter, but you can always tell when it is copied; a newspaper man can tell whether it is manufactured or not.

Q. The Bee's paper—the Evening Bee—comes here every night, doesn't it?

A. Yes, sir.

Q. You don't mean to say that you sat up and counted the columns in a paper more than once?

A. Why, yes; we counted them several times.

Q. How many of these telegrams were copied from the Omaha Bee or other papers?

A. Oh, we can tell whether they are manufactured or not.

Q. Then they did manufacture reports occasionally?

A. Why, I would like to explain now that——

Q. Just answer the question.

A. Why, I don't know now of any that were manufactured. They often reprinted, but manufacturing a dispatch is seldom done.

Q. How do I understand you to tell whether it is manufactured or not?

52 A. I can; any one can tell whether it is manufactured or not, because a telegram shows on its face whether it is honest or not.

Q. All telegrams are honest, are they not?

A. Yes, sir.

Q. You can tell when a telegram comes out whether or not it will be contradicted the next day?

A. Yes, sir.

Q. Notwithstanding it was a sell?

A. Why, certainly.

Q. You pretend to tell me that you and Mr. Cox set out and counted these dispatches, and you could tell by the face of them whether they were actually received over the Western Union wires?

A. Very closely; yes, sir.

Q. That was guesswork, wasn't it?

A. No.

Q. You say several times you did it; how many times?

A. I will give the reason why we counted——

Q. No; just answer the question.

A. I don't know how many times.

Q. What do you mean by several?

A. I mean a good many times.

Q. More than four?

A. Yes, sir.

Q. More than six?

A. I guess so. It might be as many as twenty times; I don't remember.

53 Q. Would you say that there might be—that you had counted these matters over twenty times?

A. A newspaper man knows how many lines in a column and

about how many words in a line, and can come very close to estimating how many lines of words in a morning paper without counting them.

Q. Without making any general estimate?

A. No; a newspaper man of any experience can state how many telegrams are in a paper, and can estimate it very closely.

Q. Outside of these times that you estimated, the only other information is what has been told you?

A. Yes; I have seen the files, the sheets of manifolding, and I have seen the number of pages. In instances I have been talking with the night editor of the Journal several times, and I have seen them receive two or three hundred pages of manuscript, and I know how many words it takes to make so much. I know forty pages would make our report, and when the Journal had a stock of five times that, it is pretty evidence that they were getting five times as much news.

Q. Mr. Bushnell, you say that you could not have received your report over any other line?

A. No, sir.

Q. The Postal was here, wasn't it?

A. No, sir; not when we commenced.

54 Q. It was here long before this suit was commenced?

A. I presume it was.

Q. Did you ever go to the Postal to ask them to carry your matter?

A. I presume Mr. Cox did.

Q. But you I asked? Don't presume anything about it.

A. I know that the Postal Telegraph wasn't equipped. They told me they wasn't equipped to handle the Associated Press dispatches.

Q. Isn't it a fact that the association itself would not send it to you over any other wires than the Western Union?

A. I presume that is so.

Q. Didn't they tell you so?

A. No, sir.

Q. Didn't they tell Mr. Cox so?

A. I couldn't say. I don't know anything about that, whether the association ever told us that or not. I don't know of my own knowledge.

Q. Then what reason have you to believe that you couldn't get it over the Postal? You answered you could only get it over the Western Union.

A. One reason was they wasn't here when we commenced taking the report.

Q. I am speaking now of when they did come.

A. One reason was they wasn't on the circuit that the asso-

55 ciation was on. In other words, the Associated Press send out on a circuit, and the Postal might not reach the points on their circuit.

Q. The association charges the different newspapers for its matter, does it not?

A. Yes, sir.

Q. They also charge them for that matter deliver- to its destination, except in your particular instance?

A. Now, that I couldn't be positive about.

Q. Don't you know that the Journal pay- the Press Association for their report delivered to their office?

A. Do you mean that they paid the Press Association for the telegraph service?

Q. Yes, sir.

A. I don't know.

Q. The Western Union simply collects from the different newspapers and remits to the Press Association, less its charge under contract with the association?

A. I don't know; it wasn't the way in our case.

Q. Was that your first experience in the newspaper business?

A. That was my first experience with a daily paper, but nearly for two years before that time I had charge of the Lincoln office of the Omaha Bee.

Q. How long had you been in the newspaper business before entering into this enterprise?

56 A. I run a weekly paper in Plattsmouth for eight years, and then came to Lincoln and managed the Bee's office here for two years before I went into the Call.

Q. So you never before had anything to do with a paper that had anything to do with outside or telegraphic news?

A. Why, I was working for the Omaha Bee here, had charge of their office, but never had anything to do with the home office—that is, I never came in contact with that part of their business, didn't come in contact with any of that part of their business at all.

Q. Mr. Bushnell, the paper that you owned or in which you were a stockholder was an evening paper, was it not?

A. Yes, sir; an evening and Sunday morning.

Q. What time did it make its appearance in the afternoon?

A. Weel, we aimed to go to press at four o'clock. We tried to force it a little in the winter season and get out a little earlier.

Q. What time in the winter season?

A. Well, the short days we tried to go to press a little before four.

Q. How much before four?

A. Well, as much as we could; of course, it scarcely ever would come so we could get out half an hour before.

Q. These messages, in order to do you any good and make their appearance in your paper and be in the hands of your readers, must be received by you before what hour in the afternoon?

57 A. Well, before four o'clock. Very seldom without there would be something very important.

Q. Speaking now of a general rule?

A. Yes, sir; usually they had to be there before four o'clock.

Q. Do you mean to say that, having received them before four o'clock, you could get them in the paper and into the hands of your readers at four o'clock?

A. No; not the bulk of it. It kept stringing along from between

half past eleven and twelve to four-thirty, when they would reach "30."

Q. So that "30" would have to come in before four o'clock to be of any consequence?

A. Yes, sir.

Q. As a matter of fact, didn't a great part of that report have to be in not later than three o'clock to be of any particular importance to you?

A. Well, we could always arrange it to set up other matters, and always did keep the last hour almost exclusively for telegrams.

Q. What time did you go to press?

A. As nearly four o'clock as we could.

Q. Now the Journal, which you say received discrimination afterwards at the hands of the Western Union Telegraph Company, that was a morning paper, was it not?

A. Yes, sir.

Q. Appeared what time of the morning?

58 A. Well, the Journal probably went to press about half past two, to make early trains, and along up to three or four o'clock.

Q. So that there were twelve long night hours, you might say, between the time that you required your matter and in which it would do for the Journal to receive theirs?

A. That is the closing of each one; yes, sir.

Q. Now, when you purchased the Democrat from Mr. Calhoun you knew, did you not, what he had been paying for telegraph reports?

A. By hearsay, by his saying so.

Q. Didn't you enquire before purchasing what expense was connected with the paper and what the telegraphic expense was, etc.?

A. Well, he told us.

Q. They you ascertained by inquiry from him what he was paying for this afternoon report?

A. Yes, sir.

Q. He had been paying that much under arrangement with the telegraph company ever since he had owned the paper?

A. Ever since he bought the franchise in 1887.

Q. That franchise you acquired with the other property, did you?

A. Yes, sir.

Q. Have you had a copy of the certificate?

A. No; I haven't; I think the copy is in the record.

Q. I will ask you if the copy of a document marked

59 "Exhibit A A" in the bill of exceptions in this case as it went to the supreme court is a copy of the certificate in question found on page 12 of the record?

A. Yes, sir; I think that is it.

Mr. ESTABROOK: Defendant now offers in evi- said certificate, being Exhibit A A in the former bill of exceptions in this case, to-

gether with the endorsement found on page 12 and 13 of the record in this case.

Mr. STEWART: Plaintiff objects as irrelevant and immaterial and not proper cross-examination.

Overruled. Exception.

Said copy is hereto attached, marked Exhibit "A," and found on page 194 of this bill of exceptions.

(Mr. Estabrook here reads Exhibit "A" to jury.)

Q. You understood when you was purchasing that, did you not, Mr. Bushnell, that it was something that you could agree upon, as a matter of course, but you had to agree with one of the owners of the certificate before you would be entitled to the news?

A. I don't know what Mr. Calhoun understood about it, but we purchased it with the paper from him.

Q. No one else in this city could use the news furnished under this without your consent?

A. That is what it says.

60 Q. For an evening paper?

A. That is what we paid for.

Q. So if a rival paper of this should start out in Lincoln, an evening paper, the Press Association or nobody else would have a right to give them that news?

A. No, sir; not without violating that certificate.

Q. And if they did, it would be a breach of this contract?

A. Yes, sir.

Q. Is any newspaper entitled as a matter of course to the report obtained in this by virtue of such a contract, or is to be by contract with the owners of such a franchise?

A. Well, we had a contract and it carried with it the report.

Q. And gave you the exclusive use of that report?

A. Yes, sir.

Q. Now, you found, then, that they were paying for the receipt of this report over the Western Union to be delivered between the hours of, say, eleven and half past to three or four o'clock the sum of $2.50 per day?

A. Yes, sir.

Q. You mean $2.50 by the month?

A. Yes, sir.

Q. And for that you received 1,500 words daily?

A. We received from eight to fifteen hundred.

Q. In other words, five or six words for a cent. Did you complain that that was too high for you or too cheap for the Journal?

61 A. Why, I am not complaining, but I say that, taking the two together, it is wrong to charge us five times as much as the company charged for like service to the Journal.

Q. That is the sum and substance of your complaint—that it is wrong for us to charge you five times as much as we do the Journal?

A. Yes, sir; I think it is wrong.

Q. That is all of your complaint, isn't it?

A. My complaint is that when the company makes a rate for years before to the Journal Company and then goes in and makes a rate five times as large for us, it is unjust discrimination against us.

Q. But you could not complain because five or six words for a cent is too much of a charge; but the fact is you are complaining we give to the Journal Company four or five times as much for the same money?

Plaintiff objects as not proper cross-examination.

Q. Just answer yes or no.

A. Now, if you will divide that question, I will answer it yes or no.

Q. Do you complain, Mr. Bushnell, then, that the rate of five or six words for a cent is too much?

A. I do.

Q. Why?

A. Because, taken in comparison with what they charged the Journal, it is five times as much as you charge them.

62 Q. That is your reason and the only one?

A. My other reason is that it is unjust to charge any one five times as much as you charge any one else.

Q. Are those your only two reasons?

A. Yes, sir.

Q. And they are substantially the same?

A. Well, I presume so.

Q. I understood you to say this morning that you couldn't receive this over any other line, nor particularly the Postal line, because it wasn't here at that time?

A. That is my understanding of it.

Q. How long have you lived in Lincoln?

A. Since 1886.

Q. Don't you know the Postal was here in 1883, and one of your witnesses here was working for it in 1883?

A. I don't just know.

Q. Then you are not quite positive?

A. I know we tried at the same time—we figured at the same time in getting the United Press, and the Postal in the East were handling that service, and they were not prepared to handle any for us.

Q. Except the United Press?

A. Couldn't give us that because they were not connected.

Q. Their lines were too busy, so they couldn't get it through?

A. Their lines wasn't connected through; we couldn't get put on the circuit.

63 Q. A circuit; what is that?

A. They have a circuit composed of so many cities or towns that they send the press reports to.

Q. You did, however, negotiate further before you went into the Associated Press?

A. No, sir.

Q. Did you coquet with them or what?

A. About this time we tried to see if we couldn't get some of the United Press dispatches.

Q. Do you know of any afternoon paper within a radius of a hundred miles of Lincoln that receives that number of words, fifteen hundred words daily, for $75.00 a month or less?

A. I don't know.

Q. So the only complaint you have to make is this Journal deal?

A. Yes, sir.

Q. And you complain that this defendant has gone and entered into a conspiracy to crush out this little paper of yours?

A. No, sir; nothing of the kind.

Q. Don't you allege in this petition that we have conspired with the Associated Press?

—. ——.

Q. Mr. Bushnell, whether the Journal's contract — with the Press Association or with the Western Union Telegraph Company you don't know?

A. Not to my knowledge.

Q. Whether the Journal paid the telegraph company or the association you don't know?

64 A. No, sir.

Q. What the terms of the contract between the Press Association and the telegraph company are you don't know?

A. No, sir.

Q. You have sold out the Call, have you not?

A. Yes, sir.

Q. Mr. Bushnell, the Western Union at one time expressed a willingness to recede from this contract and let you go elsewhere and not deliver the goods at all, did it not? In fact, it quit sending the messages at all and only sent the——

A. It tried to force us to quit the suit by that.

Q. And then you enjoined them from discontinuing the service, did you not?

A. I think we had some legal proceedings of that kind.

Q. You were not willing that they should stop sending these messages, but you proposed to make them send them and send them at your own price, did you not?

A. No, sir.

Q. Mr. Bushnell, do you propose to compel the Western Union not only to send you these messages, but at a price agreeable to you, or the guesswork of a jury or the judgment of a court? Is that the idea?

Plaintiff objects as not proper cross-examination and not pertaining to any facts invol-ed in this case. Sustained. Exception.

65 Q. Why is it, Mr. Bushnell, that you don't want us to quit sending these messages at $75.00, if that is too much?

A. Well, we can't afford to have our telegraphic service taken away from us when we had paid $3,000 for the franchise, and when the life largely of our paper was depending on the news.

Q. Then why didn't you go to another telegraph company?

A. Because you are the only one that handles the Associated Press news; that is why.

Q. Hasn't any common carrier a right to run its own business?

A. I don't know.

Q. How do you know you couldn't get it over the Postal?

A. Because they said they couldn't; said they couldn't handle it.

Q. When did they say that?

A. Quite a number of times; right after we bought the paper they said they couldn't handle any franchise. We went to them, as I said before, in regard to the United Press franchise, and they said they couldn't handle it in Lincoln.

Q. Did you ascertain from them how much they charged?

A. No, sir.

Q. You are not engaged in the publishing business, are you, Mr. Bushnell?

A. No, sir.

Q. How long since you have been?

A. About two years ago.

66 Redirect examination.

By Mr. STEWART:

Q. You say that afternoon report, news report, you were entitled to was exclusively for your paper?

A. Yes, sir; that is, during the afternoon hours, during up to the time we go to press.

Q. Was there anything to prevent the Journal from using that same matter afterwards?

A. No, sir.

Q. What is the fact about their using the same matter?

A. They always used the same matter.

Q. In their morning paper?

A. Yes, sir.

Q. That was additional to the night report?

A. That was in addition. They got both.

Q. Did the night report and the day report consist of the same news matter or was it different?

A. It was different, and then they duplicated some.

Q. To what extent?

A. That is hard to answer. I couldn't say. An item of news that would be confined to the afternoon report would be something that was over and past when sent in the afternoon; but something like the proceedings of Congress or something like that—something for the afternoon report—it would be incomplete, and some-

67 times I pre- it was handled more exclusively in the afternoon than in the morning, and up to the time we went to press we would get the news in the afternoon, and then the morning paper would have the same facts, with whatever occurred later.

Q. Matters of least importance would run into the night report, would they?

A. Matters of smaller importance that would be a complete item of themselves would pass right over to the night reports.

By Mr. AMES:

Q. Or occurrences after four o'clock?
A. Yes, sir.

By Mr. STEWART:

Q. Any occurrence that was contained in full in the afternoon report, would that also be telegraphed in the night report or would it simply be in the afternoon?
A. The Journal would take that and have it out in type before the night report commenced.
Q. And that was received at the same time your report was received?
A. Yes, sir.
Q. Well, go on and say to what extent they could use the afternoon report independent of the night report?

Defendant objects as irrelevant and immaterial and not proper redirect examination. Overruled. Exception.

68 A. It is very hard to answer that. It would be according to the character of the news. Sometimes all and sometimes two-thirds, and sometimes possibly less than that; so, as a rule, I would say a little over two-thirds of all of it.
Q. Independent of the night reports?
A. Yes, sir.
Q. What was the fact as to their having used two-thirds of all of it—the Journal, I mean?

Defendant objects as incompetent, irrelevant and immaterial, and not proper redirect examination. Overruled. Exception.

A. They use it always, and I should think they used from two-thirds to all of it.
Q. You spoke in your cross-examination about paying the Press Association for its services separate from what you paid the Western Union?
A. Yes, sir.
Q. What was the amount that you paid the Western Union?

Defendant objects as incompetent, irrelevant, and immaterial. Sustained. Exception.

Q. I understood you to state that you paid the telegraph company, the defendant in this case, $75.00 per month?
A. Yes, sir.
69 Q. That is, in addition to any payment you made the Press Association?
A. Oh, yes; that was for the tolls—the telegraph tolls—the transmission.

Recross-examination.

By Mr. ESTABROOK:

Q. You know, of course, Mr. Bushnell, that the Journal might use in its morning — all what you printed the night before, did you not?

A. Yes, sir.

Q. Indeed, the franchise to which I have referred here would not prohibit them from doing that, it only relating to afternoon papers, to which you had a monopoly of the news?

A. Yes, sir; to afternoon papers.

Q. So that when they were taking this copy of the afternoon report for you they would also at the same time take a double impression, and the Journal would either send after it or it would be delivered for it in the afternoon?

A. It was always taken in manifold.

Q. Explain to the jury what manifold is.

A. It means to take two sheets of thin paper and put a carbon sheet between them, and while you are writing on the top sheet it goes through and takes a copy on the under sheet.

Q. That is done with a stylus or agate point?

A. Something like that.

Q. This sheet is a kind of tissue paper?

70 A. Yes; it is a tissue paper.

Q. So they could take as many copies as they pleased with one impression of a pen or stylus?

A. Could take several.

Q. You never objected to the use of this by the Journal, did you, after you had used what you wanted?

A. It had no affect on us after we had used ours; it was the same report as ours and taken in duplicate.

Q. I will ask you whether or not you ever did object to either the Press Association or the telegraph company or the Journal to this use they made of it after it appeared in your paper?

A. No, sir; only once, when they got out an extra on some important occasion.

Q. You objected to the Journal then?

A. Yes, sir; and to the telegraph company, and they delivered it to the Journal, so the Journal got out an extra on our time.

Q. That was on one occasion?

A. Yes, sir.

Q. Never occurred again, did it?

A. Never occurred again as I know of. We objected, and it never occurred again.

71 Redirect examination:

By Mr. STEWART:

Q. I will ask you whether or not the Journal used this afternoon report in an evening edition before the Democrat began taking it?

A. No, sir; the Journal never had an evening edition.

Q. So they took it prior to the time the Democrat began, simply for their morning edition?
A. Yes, sir; the same as afterwards.

Recross-examination.

By Mr. ESTABROOK:

Q. Took it; what do you mean by that? Ever take it, receive it or pay for it, or what?
A. It came to them.
Q. What they paid for it you haven't any knowledge, have you, to the Press Association?
A. Yes, sir.
Q. Did you testify here that you knew from what they told you how much they paid for that afternoon report?
A. I know what they paid for their entire report.
Q. Did you not include the afternoon report?
A. Yes, sir.
72 Q. That they had a right to receive that by virtue of a contract, to demand it by virtue of it, you don't know?
A. Oh, no.

Mr. STEWART:

Q. How much was it they paid?
A. $125.00 a month.

Mr. ESTABROOK: Defendant asks to have that answer stricken out.

Mr. ESTABROOK:

Q. Mr. Bushnell, do you know how much the Press Association paid the Western Union for that report?
A. No, sir.

Witness excused.

73 D. N. SYFORD, being produced and sworn on behalf of the plaintiff, testified as follows:

Examined by Mr. STEWART:

Q. Mr. Syford, where do you reside?
A. Lincoln, Nebraska.
Q. How long have you resided in Lincoln?
A. I first came here in '73, and I was away three or four years, and came back in '77. I have been here continuously since '77 or the latter part of '76.
Q. What is your occupation now?
A. I am a farmer now and stock-raiser.
Q. What was your occupation during the time of your residence here in Lincoln?
A. I was an operator—telegraph operator.
Q. How long have you been a farmer?

A. Well, *the* follow the business and nothing else, I have been only since about September, but I have run a farm by proxy for the last ten or twelve years.

Q. How much of the time since you have resided in Lincoln have you been a telegraph operator?

A. All the time until just the last fall, about September 10th.

Q. What company did you work for?

74 A. For the latter part of '76 until '85, or possibly the latter part of '84, I worked for the Western Union continuously; then that intervening from '85 until '90, about five years, I worked for the Postal Telegraph Company, which had just come in as an opponent to the Western Union, and then I returned to the Western Union, and I have worked with the Western Union ever since until the fall of 1895.

Q. What time in 1885 did you quit the Western Union?

A. I say I am not certain about that; it was in the latter part of 1884, and possibly in '85. The Postal came in '85, and I took a position in that office. I was manager of that office. I opened the office and run that until about '90, possibly five years, and then I returned to the Western Union, and I have been an operator almost continuously, except one year that I was down to the B. & M. depot here in Lincoln.

Q. What year was that, that you was at the B. & M. depot?

A. I think in the eighties; possibly the latter part of '89 and into '90 some time. I am not sure now about that; it might have been the latter part of '90 instead of '89, but that is about the time.

Q. Now, in your employment with the Western Union, did you ever have anything to do with the transmission of the day or night Associated Press reports?

A. Do you mean with the transmission?

Q Yes, sir.

A. I had nothing to do with the transmission; I received it.

75 Q. In 1890, when you went to work for the Western Union, what did you have to do with receiving these reports?

A. I received. That was my work ever since I have been there. In former years I received in the daytime, and then three years at night, and then when I got back I received the day report all the time, unless some little change might be made by which some man left, or something like that.

Q. Now, while you were taking this day report after you got back to the Western Union, during what hours of the day was it transmitted and received here at Lincoln?

A. Well, now, as I said before, I am not sure about '90. That might have been in 1889. Well, the Associated Press report in the daytime in the city of Lincoln always commenced within five or seven minutes of the same time, and always got "30" about the same time. It wouldn't vary fifte-n minutes.

Q. What time was that?

A. That would begin near eleven o'clock; sometimes a little before or after eleven, and we would get "30" by three o'clock or, if it was a little late, about 3.10, and sometimes if the wire was out of

order, or something like that, it might run a little later, but usually we would get it out by 3.10.

Q. Getting "30" you mean what?

A. I mean the end of the report. That is the character given by the association. That is the end, and that only applies to press reports.

75½ Q. What was the amount of this day report? What was the number of words from 1889 to 1890?

A. I will say in those years the report consisted—oh, I don't know; it would run in the daytime—sometimes there would be a dearth of news, and in that case we would get a message to that effect, and sometimes, possibly, only five or six hundred words, and other times I have got as much as three thousand in the afternoon; but it would run, probably, I should say, about fifteen hundred, sometimes less and sometimes more, and sometimes more than they wanted to take.

Q. What do you know about the night report during that time?

A. Well, what about it?

Q. The amount.

A. The amount of the night report—I took that a year during this latter term. The night report was a heavy report and consisted of—it run from five to seven or eight thousand, and sometimes they would get crowded and send us fifteen thousand. They aimed to send us about five thousand, but often late at night something sensational would occur, and they would hold us for the balance of the story, and many a night twenty thousand words would come. The President's message was given sometimes, and that would be pretty heavy.

Q. What about the average?

—. The average would be about five or six thousand words.

Q. And the average in the daytime?

A. Fifteen hundred.

76 Q. How was this day report furnished to the newspapers here in Lincoln?

A. It was delivered by the Western Union Telegraph Company.

Q. Two copies made—manifold copies?

A. We made two copies for a while, but in later days only made one. I say formerly there was two copies, but for the last couple of years they haven't taken but one copy. I don't remember just the exact time they commenced to only take one copy.

Q. Well, the Journal don't — either the day or night Press Association reports now, do they?

A. I don't know; don't pay any attention to it, and don't care.

Q. Prior to the time the Democrat and Call began getting the reports, how was it? What was the facts about the Journal getting it?

Defendant objects as irrelevant, incompetent. Overruled. Exception.

A. Why, the Journal got and got it ever since that time until recently.

Q. What time did the report come when the Journal alone got it?
A. The night report?
Q. No; the day report.

Defendant objects as irrelevant and incompetent. Overruled. Exception.

A. When?
77 Q. When the Journal got it alone?
A. It came just exactly the same time as it always come; it started about along in the neighborhood of eleven o'clock and gets "30" in the neighborhood of three; about 3.15 would catch it every day.
Q. How long did you say you took the day report before you left the Western Union in 1885?
A. From when?
Q. How long before you left, how many years?
A. I think four years in the daytime and three years at night; about that way, I guess.
Q. Now, what circuit did the day report come over, Mr. Syford?
A. Well, from 1877 until 1885, the former part of my employment, it came from Kansas City at that time over a joint B. & M. and Western Union wire, but since that the Western Union have built a straight wire on the U. P., and then they got to getting this day report from Omaha.
Q. But after 1885, how did it come?
A. It came from Omaha, but sometimes by Nebraska City; they had an old wire, and sometimes it would fail, and then they would use the other.
Q. What points did that circuit take in, the day circuit?
(Mr. ESTABROOK:) What years are you speaking of, Mr. Syford?
A. Of course, when I was away I didn't know anything about it until I went back.
78 Q. Now, then, subsequent to 1889 or 1890 what was the circuit of the day report then?
A. From 1889 to 1895 and up to the present the day circuit and night circuit are practically the same. Chicago send- this report now in the daytime and the night over about the same circuit. Chicago sends it in the daytime to Des Moines, Council Bluffs, Sioux City, Sioux Falls, South Dakota, sometimes Yankton, Omaha, and Lincoln, and at night Keokuk and Springfield, Illinois; add that to the day circuit at night.
Q. Then this report is received at these points at the same time it is received here at Lincoln, is it?
A. At which points?
Q. The points you have named.
A. All receive it at the same instant; yes, sir; all get it at the same time. All these points are on the same circuit at night as at day, except at night they often put on Springfield and Keokuk, which are never on in the day.
Q. That is what is called the western circuit?
A. Yes, sir; Northwestern Associated Press.

Q. Was there any different facilities used, Mr. Syford, in transmitting or receiving the day report other than what are used for the night reports?

A. Well, I don't know what you mean by that. That would embrace a great many things.

Q. What I mean, does it require different force or instrument or help or anything of that kind, if you know?

79 A. The night report invariably come on a single wire, because at night they had the wires to spare and could use them for this report, but in the daytime this report would come on some side of a quad the company wasn't using.

(By the COURT:) A quad—that means different wires?

A. It is one wire multiplied or increased in capacity whereby four men can work at each end on one wire at the same time.

Q. Do I understand you that it is any more difficult or troublesome to send it that way that the other—that is, in the way of expense or time?

A. Where they use the quad it is a saving of time and expense.

Q. How long would it take an operator to receive this report, say, of 1,400 or 1,500 words in the daytime?

A. Just as quick as they can send it.

Q. Well, how long by steady work?

A. That would depend on the condition of the wires and the operator. He might under good conditions take—he can take forty words a minute—sit and take it. It is easily done and has been for twenty-five years. A man has to get it out, but if he didn't get the report there in time the newspaper would kick.

Q. What would be about an average number of words a minute?

A. Thirty words a minute is a good average.

Q. So it would take about 35 or 40 minutes?

A. It would take probably an hour to do it the way it is sent out, right along.

80 Q. Where they had a let up, what was the method here in *in* this Lincoln office? Would the operator sit right there and wait until it commenced coming again or would he go ahead at other work?

A. If there is a let up in these reports for any reason at the other end of the line that the sending operator does not continue, but stops for a short time, then the operator goes right on at other work, receiving messages.

Q. This is the way it was always done?

A. Yes, sir.

Q. They suppose a man to keep busy?

A. Yes, sir; if they didn't have anything ready for him, they would put him on the quad, and he would sit there receiving maybe for a few minutes, and then go back to his report table again—that is, if it was necessary. Sometimes they didn't have to do that and sometimes they did.

Q. Mr. Syford, are you acquainted with the rates of charges made by the Western Union for services generally?

A. The press service?

Q. In any class of service.

A. Well, I can't say that I am—that is, they have often changed them from year to year, you know, and then maybe they wouldn't change them for a number of years.

Q. Say, prior to this year?

A. Why, I used to be acquainted, of course, with all the
81 rates of message rates.

Q. I will ask you to state to the jury the difference in rates from 1888 to 1891, inclusive, between day and night rates in business generally.

Mr. ESTABROOK: What do you mean, commercial rates?

Mr. STEWART: Yes, sir.

Mr. ESTABROOK: The defendant objects as incompetent, irrelevant, and immaterial.

Sustained. Exception.

Q. You may state what difference in rates the defendant maintained in its commercial business between day and night work.

A. When?

Q. Well, from 1888 to 1891.

A. Why, I don't think—of course there is a difference in some of the service, but in the proportionate rates I don't think there is any difference between 1888 and 1891.

Q. I want the difference for charges for messages between day and night from 1888 to 1891?

Mr. ESTABROOK: The defendant objects as irrelevant and immaterial and incompetent under the issues in this case, because it is not a commercial rate, but a trade rate for newspapers.

Overruled. Exception.

82 A. There was about a year there that I wouldn't feel like saying, because I wasn't acquainted with them, but generally the night rate compared with the day rate is about as thirty is to forty, or thirty to fifty, and forty to sixty, and fifty to seventy-five; about that way was the comparison rate, about a two-thirds rate; and sometimes the night rate is as much as the day rate. The minimum rate in the daytime is twenty-five cents.

Q. And when the night rate is thirty cents the day rate would be forty or fifty cents?

A. Yes, sir; about that. It used to be a straight half rate a long time ago.

Q. When was that?

A. Oh, eighteen or twenty years ago they tried a half rate, but stopped and changed it again——

Mr. ESTABROOK: The defendant objects as incompetent, irrelevant, and immaterial.

Overruled. Exception.

A. —because it filled the night office with so much business, and they concluded to raise the rate, as I have already said, to about a three-fifths rate.

A. According to the figures you gave, they would charge about seventy-five per cent. for night messages?

A. Very nearly.

83 Q. You say, for instance, the night rate where it is twenty-five cents the day rate is the same?

A. Yes, sir.

Q. And that covers a considerable territory?

A. Yes; where the night rate is twenty-five cents the day rate is as cheap as they can make it.

By the COURT: And that is on what kind of business?

A. That is on this message business; what we call commercial business in the nature of messages and the like.

Q. What other class of business do they have?

A. Do they have in the daytime, do you mean?

Q. Any time.

A. Have market reports, stock markets, corn markets, and all those market reports, and if anything occurs in the daytime sensational and all of that kind of work, and that is about all they have in addition to this message business in the daytime.

Q. You know anything about these market reports, anything about that class of business—the difference in the day and night rates?

A. There is no night report except on this Associated Press.

Q. You know anything about specials?

A. Oh, no.

Q. What is the volume of business done which you call

84 commercial business as compared to this other?

A. As compared to what business?

Q. Well, the press and other business.

A. Well, the day business is just like a stream of flowing water, continually flowing; commercial business coming in all the time.

Q. Well, can you give anything like an estimate by a comparison of the volume of commercial business as compared with all other classes of business—what proportion?

A. Oh, it is hard to tell.

Q. Would it be more or less?

Mr. ESTABROOK: You mean here in this local office or all over the United States?

STEWART: Her- at Lincoln.

A. Why, the commercial business as compared with the special business or the press business—the commercial business is a great deal more, of course, than the special or press business. I wouldn't pretend to say what proportion, because some offices do less press business and a great deal more of this commercial business. I wouldn't want to make a comparison, but I would estimate the commercial business as a great deal more.

Q. Well, your experience of some twenty-odd years at Lincoln gives you some information as to the business of the com-

85 pany generally. Explain to us as to the amount of business transacted generally.

A. Over the company's wires?
Q. Yes, sir.
A. Well, if the men work everywhere as here, on all kinds of business as was done here, and every fellow has no more to do than I have, I would think they had a great deal of business, because I always had enough to keep me busy; but at some times, of course, they are doing more at other places than they are here.
Q. How do you know they are doing more?
A. I can hear it; sit and hear it.
Q. Hear it anywhere over the wire?
A. Yes, sir.

Cross-examination.

Examined by Mr. ESTABROOK:

Q. Mr. Syford, twenty years ago what was the day rate on commercial messages between Lincoln and Chicago, for instance, or Chicago and Lincoln?
A. Twenty years ago the day rate from Lincoln to Chicago was sixty cents and four; four cents extra for a word.
Q. How many words for sixty cents?
A. Ten words.
86 Q. And for each word over that four cents?
A. Yes, sir.
Q. And it was sixty cents for one message of ten words?
A. Yes, sir.
Q. And extra words it was four cents each?
A. Yes, sir.
Q. What is the rate now?
A. Since then the rate was cut down to forty and three, or at the time the F. & M. organized and came in as a competitor.
Q. What time was that?
A. In 1881, I think. I think the rate was forty and three then.
Q. And the night rate was what?
A. Twenty-five and one to Chicago. For a while it was thirty and two, but I think now it is twenty-five and one.
Q. Now, these little messages that you designate as commercial, as a matter of fact are no more than an average of ten words, are they?
A. They won't average ten words.
Q. Now, they are received by a man at the counter and sent to the operating-room?
A. Yes, sir.
Q. From there they are telegraphed as they hang on the hook to the various destinations designated on each?
87 A. Yes, sir.
Q. After calling up the office?
A. Yes, sir.
Q. How do you call for an office?
A. By signals.

Q. What is the signal for Chicago?
A. C–H.
Q. And you would tick on your instrument C–H until you could get a reply, and sometimes you would have to wait for a long while?
A. Yes, sir.
Q. And sometimes the various offices on that circuit would want to get in at the same time?
A. Yes, sir.
Q. So that the operator is squandering a good deal of time and patience in trying to get a chance at the operator at the other end?
A. Yes, sir; that would depend, of course; but Chicago and Lincoln would be apt to be put on a special wire.
Q. That is in modern times?
A. Yes, sir.
Q. But in other little towns that couldn't be done?
A. No.
Q. How much time did you sometimes spend in breaking in and trying to get a chance at the other end?
88 A. Sometimes we would get it in a few minutes, and sometimes there would be a long break before we could catch them.
Q. Well, now, the operator at the other receives it as you send it there, then copies it down on one of these telegraph blanks, and it is then sent down into the delivery-room, is it?
A. Yes, sir.
Q. Then what is done with it?
A. It is delivered to the party.
Q. Sealed up in an envelope?
A. Yes, sir.
Q. Put in the hands of a messenger?
A. Yes, sir.
Q. And delivered to its destination?
A. Yes, sir.
Q. From Lincoln to all points in this State, how much is it for commercial messages of that kind, ten words or less?
A. I believe at present the rate throughout this State, from any point in this State to any point in this State, is twenty-five cents.
Q. And that is the minimum, whether day or night?
A. Yes, sir.
Q. And from Chicago to St. Louis, is it forty and three?
A. I think so. That is what it always has been since the sixty-and-four rate.
89 Q. Now, when we come to press reports, Mr. Syford, the night report consisting, as you say, of an average of five thousand words, I understood you to say?
A. Yes, sir; never took less than sixty sheets.
Q. That is, when there is a supply turned in at the other end, the operator takes it and sits there until he takes it all, doesn't he—the night report?
A. At this end?
Q. At both ends.

A. Sits there until they are through.

Q. There is no breaking in of the circuit; it has the right of way, hasn't it?

A. Yes; that night report has; we look upon that as having the right of way, but there is a breaking in if the railroad wants to use. They will have it, and we will have to wait.

Q. You mean for the operating of their trains?

A. Yes, sir.

Q. They have the preference over the wires?

A. Yes, sir.

Q. But, with the exception of that, the Press Association has the right of way, and it is continuous, isn't it?

A. Yes, sir.

Q. And if it is in the daytime?

A. Yes; it is now.

90 Q. But did it used to be?

A. It used to be relayed at Omaha.

Q. You were not working for the Western Union when Mr. Carrol came here, was you?

A. Why, he hadn't learned the business yet when I came here.

Q. But you wasn't working for the Western Union the same year he came here?

A. No, sir; I was not; I was with the Postal.

Q. Didn't he come here, Mr. Syford, in January, 1885?

A. I believe he did; probably in 1885. I know about that time, but I don't know what month, nor I couldn't swear what year.

Q. Was that about the latter part of 1884 until 1890; what time in 1890 did you work for the Postal?

A. I might have quit the Postal in the year 1889. I am not just positive about that.

Q. And then you went to the B. & M.?

A. Yes, sir; for about a year.

Q. So there was a period of over five years that you wasn't with the Western Union?

A. Yes, sir.

Q. Now, wasn't the period of 1885 to 1890 the period of greatest growth, both in Lincoln and in Omaha, both in money, commercially, and in population?

A. The growth of the city or business, do you mean?

91 Q. Growth of city and business both; don't the business grow with the city's growth?

A. Yes, sir; I guess it did. Probably during that time was the time when the great growth in business occurred here.

Q. How many wires between here and Omaha in 1885 or 1884, between here and Omaha?

A. You mean Western Union, owned by the Western Union?

Q. Yes; the ones with which they did business.

A. There was joint wires with the railroad, who used them in 1884, between here and there. There was two straight Western Union and Union Pacific number five and the overland, by way of Nebraska City.

Q. Was that prior to that time that the day reports of this circuit came by way of Kansas City?

A. Yes, sir.

Q. You never used a railroad wire for that purpose, did you?

A. We may have done it, when they wasn't using it, but it wasn't customary.

Q. In that time, Mr. Syford, was there the same regularity in the receipt and promptness of this day message as there is now?

A. Of this day report?

Q. Yes, sir. When did you get "30" then?

A. About the same time, but there wasn't as much regularity as now. I mean about the working of it. Now we sit down and as long as there is any report we can get it, but we would al-
92 was*y* get the report in about the same time. I don't think it has ever varied over ten minutes, whether it came over one route or the other.

Q. Do you know what the rates are for reports, press reports?

A. Now?

Q. Yes, sir.

A. No; I don't know what rates they are giving now.

Q. Do you know the difference between the day rate and night rate on press-report matters in 1884 or 1885?

A. Oh, I knew, I think, but I have forgotten. On the United Press I knew the rate, but the Associated I have forgotten now.

Q. You received, did you not, Mr. Syford, the United Press report over the Postal?

A. Yes, sir.

Q. What years was that that you received the United Press reports through the Postal?

STEWART: The plaintiff objects as not proper cross-examination. Overruled. Exception.

A. We took it all the years during the time I was employed by the Postal.

Q. That was from 1885 to 1890?

A. I think so.

93 Q. Was that the night report or the day report too?

A. Considered in that report then.

Q. How many words?

A. They called it ten thousand words, but it would fall short of that.

Q. Do you know what the Postal Company rates for its services now for the United Press service—do you know what the Postal's rates are for the transmission of that report?

A. Do you mean that rate that the paper paid the company for this report?

Q. Yes; per word, of hundred words.

A. Why, they had a monthly contract.

Q. Did you ever see it?

A. Yes, sir.

Q. Did you collect from the Journal?

A. Yes, sir; at that time, during my five years at the Postal, the contract of the United Press and our price to them was $205.00 per month, which we collected every month, and paid $80.00 out to the operator.

Q. Did I understand you to say that during the time you worked for the Postal you did not go into the Western Union telegraph office?

A. I never went in there once, and I set out to work against the Western Union, and I didn't have a word or anything to do with them, but I started out to work against the Western Union,
94 and build up a business for the Postal, and that is what I did.

Q. And that is what the Postal is trying to do and has been all the time?

A. Yes, sir.

Q. And are doing it yet?

A. Yes, sir.

Q. Did the Journal receive any day reports from the United Press?

A. No, sir.

Q. They owned the forenoon franchise of the United Press, didn't they, Mr. Syford?

A. I understood so.

Q. Did they have any communications with you for afternoon rates — Mr. Hathaway?

A. Yes, sir; at one time.

Q. Do you remember the rates that you quoted to Mr. Hathaway for afternoon rates?

A. No, sir; didn't know anything about it, because I didn't give it to them and didn't pay any attention to it.

Q. Do you know that the Western Union put up its extra wire, the wire which it now receives the Associated Press reports over?

A. They take it on the quad. A new wire can be put onto the quad any time.

Q. There was any extra wire put up, wasn't there?
95 A. Yes, sir.

Q. When was that?

A. I don't remember.

Q. Wasn't that in 1887?

A. I don't know when that was built; it was built since I left there, I think.

Q. And that gives better facilities for handling it—you say that it comes direct instead of being relayed?

A. Yes; I used to get it from Omaha, and now it comes direct from Chicago.

By the COURT: How long since it came direct from Chicago?

A. It was my understanding when I came up from the B. & M. depot, along in the latter part of 1889 or '90, when Mr. Mahoney came up to ask me to take the day report—had a man taking it from Omaha, and he wanted me to take it; they had some trouble with the new man—he was a new man—and I took it from that time,

then from Chicago; that is the first that came from Chicago regularly unless occasionally they might send it before that, and they have sent from Chicago direct ever since.

ESTABROOK:

Q. Mr. Syford, do you know the difference between night rates and the day rates over the Postal for the United Press reports? What is the difference between the rate per hundred words,
96 we will say, of the United Press daily reports and the United Press night report over the Postal line?

Mr. STEWART: The plaintiff objects as not proper examination. Overruled. Exception.

A. The United Press doesn't send any day report to this point, unless it is recently. They do to other points.

Q. Do you know the difference to Omaha or to any other city?

A. I don't know anything about their rates since their reorganization with the old Pacific Telegraph Company.

Q. When did that reorganization take place—about when?

A. I believe about in 1886—along there some time.

Q. Do you recall what the difference was prior to that time.

A. No, sir; I know nothing about Omaha rates or anywhere else, and they didn't send any day reports to this point.

Redirect examination.

Examined by Mr. STEWART:

Q. Now, Mr. Syford, did I understand you to state that you didn't make the Journal rates on the day Associated Press for the
97 reason that you didn't have the wire, or on the Postal; I mean that you didn't have the connection with the day circuit?

A. Yes, sir; we didn't want any day station.

Q. Were you connected?

A. No, but we could have been; we didn't have the facilities in order to do justice to the service.

Q. The United Press day report was on a circuit taking in a number of different points?

A. Yes, sir.

Q. And wasn't you connected with these points—I mean on the day report?

A. No. They had put in a quad at Omaha, and you can't work midway in a quad.

Q. So you made them no rate at all?

A. No; I don't remember that we ever made them a rate.

Q. Now, when a day report of the Associated Press which they—Call, Democrat, and Journal—was receiving was relayed at Omaha, what do you mean by relay?

A. I mean that we was not on that regular circuit; that we got on in later days, and Omaha was on the circuit, and Omaha received the report and relayed it to us.

Q. How many men did it take to get that report from Chicago to Lincoln under that system?

A. It took a man at Omaha and one in Lincoln; yes, it
98 took three men. A man at Chicago, who originally sent it to Omaha, and then a man at Omaha, who relayed it to us at Lincoln, and a man to receive it here.

Q. How many men did it take to get that report here when they sent it direct from Chicago?

A. It took two.

Q. That is, a man sending it from Chicago and a man receiving it here?

A. Yes, sir.

Q. Well, would it take any greater number of wires between here and Omaha to send it direct from Chicago by way of Omaha to Lincoln than it would to send direct from Chicago to Lincoln?

A. Oh, it might not; the same wire ought to carry it, whether relayed or not; but ordinarily that would take another wire.

Q. Then it would take just as many wires between here and Omaha to get the same report here as it would under the old system?

A. Yes; same number of wires, but take one more man.

Q. To relay it?

A. Yes, sir.

Recross-examination:

99 Examined by Mr. ESTABROOK:

Q. During all these years, from the time the Postal has been here until now, it has had direct communication between Lincoln and Omaha and from there to Chicago?

A. Yes, sir.

Q. So that when this communication between you and the Journal was had you didn't have to make connection in order to take this report—that is, the Postal would have to relay?

A. Oh, yes; but we didn't have the general facilities.

Q. But the facilities you had and used in the daytime, and it didn't pay you to take this report?

A. It paid better to handle commercial business than it did this report in the daytime.

Q. And the number of messages you handled in the daytime occupied your entire force to the exclusion of this report?

A. Yes, *sir;* most of the time, but sometimes when business was dull it didn't.

Q. So that it depends entirely upon the amount of business being done whether it pays to handle this stuff for the newspaper?

A. Yes, sir.

Q. And daytime, Mr. Syford, is a time for doing business, isn't it? I mean telegraph business.

100 A. At present the telegraph business is a little slow, but there has been a time when it seems that every one was doing

their business by telegraph. That was the time when the railroad had this half rate. Yes, I have known times when the telegraph business was more brisk than it is now.

Q. Well, the day rate then was too high, wasn't it, and the people did most of their business at night because it was cheaper?

A. Yes, we would do lots of business at night, but I have sent long messages in the daytime and lots of them.

Q. But I am speaking now of modern times, say in 1887 to 1895. How about the night business as compared with the day business in amount?

A. In amount the night business is comparatively smaller, for in later days you have a little time at night, and in the daytime you never do.

Q. How many operators at night business do they have here?

A. The night business, except on special occasions, and has been for the last few years, has been attended to by three men.

Q. And the day business?

A. Eight men, and I have seen about as many as ten.

Q. That is besides the messengers?

A. Yes; I mean eight operators.

Q. That is in addition to the number of messengers and so forth.

101 A. Yes, sir.

Redirect examination.

Examined by Mr. STEWART:

Q. Now, how far back would that relative proportion extend, Mr. Syford, as to the number of persons employed?

A. Well, in this office, the farther back you go the less persons were employed. There was a time when we didn't have any additional force, so I don't see how I could answer that question properly; it refers to so many different times.

Q. They usually kept more men at work in the daytime than at night?

A. Yes; always, unless something special. I have seen the time when the day force and night force both were busy, when something was going on like a Republican convention or a Democratic convention.

Witness excused.

102 Mr. STEWART: The plaintiff asks to read in evidence the testimony of J. D. Calhoun, taken at the former trial, on the ground that he is absent from the State.

Mr. ESTABROOK: The defendant objects as incompetent to read testimony from the bill of exceptions without its having been shown that there has been due diligence used to get the witness present or an effort made to take his testimony in the ordinary way.

Objection overruled. Defendant excepts.

The evidence of said J. D. Calhoun, as reported in the former bill

of exceptions in this case, was here read to the jury by Mr. Stewart, attorney for plaintiff, and is as follows:

103 J. D. CALHOUN, called in behalf of the plaintiff, sworn, questioned by Mr. Stewart, testified as follows:

Q. Where do you reside?
A. Lincoln, 1130 Plum street.
Q. What is your occupation?
A. An editor and publisher.
Q. Were you prior to 1888 the proprietor of the Daily State Democrat, a newspaper published in this city?
A. Yes, sir.
Q. How long were you proprietor of that paper?
A. I think, 23 months.
Q. During that period did you, as publisher of that paper, have the Associated Press dispatches here?
A. During the latter portion of the time.
Q. About how much of the time?
A. I could not say without refreshing my memor-; several months; possibly a year.
Q. You purchased that privilege from the Associated Press?
A. I purchased the franchise; yes; and the privilege of the dispatches.
Q. What did you pay for it?
A. Two thousand dollars.

104 Q. When you sold out the Daily State Democrat, that went with the office to the Daily Call?
A. Yes, sir.
Q Prior to the time that you purchased that franchise, do you know whether the Daily State Journal received these afternoon dispatches?
A. It did.
Q. For how long a period, so far as you can tell?
A. A number of years; possibly twelve or fourteen. At any rate, I can make it clear by a statement.
Q. Go ahead.
A. The system of sending telegraph dispatches is divided into morning and afternoon reports. The afternoon report is sent in the afternoon to morning papers just the same as it is to evening papers. The afternoon report begins usually about 11.30 and closes about 3 to 3.30. The morning report begins in the evening—7 o'clock, usually—and closes when the amount has been sent or all the news is exhausted—it varies a little in amount—generally about 1.30 to 2.30 in the morning.
Q. Prior to the starting of the Daily State Democrat, was there any other paper that got these dispatches except the Journal?
A. No, sir; there was no afternoon paper that got them.
Q. You say the Journal got them right along?
A. Yes, sir.
Q. Do you know what time they got them?

105 A. What time they were received at the office?

Q. Yes, sir.

A. It was usually at the convenience of the telegraph editor. If he wanted them at any time he would go to the office or send to the office and get them, if they had been received. It was my custom, at the time I was editing the telegrams, to go about four o'clock and get them and edit them up, but they were not sent up until evening.

Q. You were editor of the Journal at one time?

A. Yes, sir; managing editor.

Q. For how long?

A. I could not remember. Two or three or three or four years. I filled various positions on it.

Q. Prior to these Associated Press dispatches being received by any afternoon paper, the State Journal then I understood got them, and got them as soon as they wanted them, after they were received at the telegraph office in this city?

A. Yes, sir; they were had whenever they were called for after they were received at the telegraph office.

Q. Do you know about how many words the State Journal Company received in Associated Press dispatches in the afternoon and morning reports?

A. I think 6,500 words. I would not be positive. 6,500 words, when I was connected with the Journal, was the total amount received, though the amount, I think, delivered generally ex-

106 ceeded that, but that was, I think, the number specified in the franchise.

Q. They had a franchise, did they?

A. Well, not all of the time; they were applicants for a number of years and finally secured the franchise.

Cross-examination.

By Mr. ESTABROOK:

Q. Prior to the inauguration of the Democrat, was there any stipulation as to when the afternoon news was to be received, the day news, between the telegraph company or the Press and the Journal?

Mr. STEWART: Do you know of any such writing?

Q. Are all of these matters in writing that you have been talking about?

A. I don't know that I have spoken of anything that could be in writing. I have spoken of the receipts of the dispatches of the time, the hours, etc. I don't understand that I have been questioned on agreements and contracts.

Q. Then, my question is as to whether there was any contract as to the hour when this was to be received—the afternoon dispatches I am speaking of?

A. None that I know of.

107 Q. How long were you connected with the Journal?

A. Six years altogether.

Q. When you started the Democrat you negotiated for the purchase of this press franchise, did you?

A. Some time afterwards.

Q. Some time after you had started it?

A. After I had purchased the paper.

Q. I will ask you if that is one of the letters you wrote (handing witness letter marked "Exhibit A").

A. Yes, sir.

Q. Upon making the application to the Press Association for this franchise what was said in regard to telegraph rates?

Mr. STEWART: I want to know if what he is calling for is in writing.

The WITNESS: All the negotiations I had, either with the telegraph company or the Associated Press, were in writing.

The plaintiff here objects to the witness being asked what was said in regard to telegraph rates.

Q. Have you those (letters)?

A. I think not. I might possibly have them.

Q. Did you turn over your correspondence to Mr. Cox?

108 A. I think not. I turned over simply the franchise.

Q. Then you don't know where the correspondence is?

A. There was very little correspondence. I wrote to Mr. Dickey and had an answer from him.

Q. What I am speaking of now more particularly is about what terms you obtained the franchise.

Objected to as incompetent, irrelevant and immaterial, and not the best evidence. Sustained, and defendant excepts.

Witness excused.

109 J. D. CALHOUN, recalled on behalf of the plaintiff, questioned by Mr. Stewart, testified as follows:

Q. In your testimony yesterday, how long did you say you had been with the State Journal?

A. Six years.

Q. Prior to the starting of the Daily State Democrat?

A. Prior to my purchase of it.

Q. And about six years prior to the time you began taking the afternoon Associated Press dispatches?

A. Something more than six years prior. I commenced taking the Associated Press dispatches, I think, the following spring after I purchased the State Democrat—in the summer.

Q. Now, during that period of six years or seven years prior to the time you commenced getting the Associated Press dispatches, I will ask you if you know if its charges paid to the Western Union by the State Journal for telegraphic services were the same as it paid afterwards or if you know what it paid prior to that time?

A. I know what it paid.

Q. Prior to that time?

A. Yes, sir.

Q. How much was that?

A. They paid to the telegraph company $125.00 a month and to the Associated Press——

Q. I don't care for that. Just what it paid the telegraph.

110 A. $125.00 a month to the telegraph company.

Q. During these six or seven years prior to the time you commenced taking them for the Daily State Democrat?

A. Yes, sir.

Q. Your contract with the Western Union, or your agreement by which you paid them $75.00 per month for that telegraphic service, did you make that contract for any definite period?

A. No, sir.

Q. Was that any part of your contract with the Associated Press, or have anything to do with it?

A. No, sir; nothing at all.

Q. You simply when you got your Associated Press franchise, you then made your terms with the telegraph company?

A. I ascertained first from the telegraph company what the dispatches would cost me when I purchased the franchise, and the purchase of the franchise depended on whether I could stand the cost of the telegraphic service.

Q. And after you found what you would have to pay the Western Union for their services you then bought the franchise?

A. I then bought the franchise.

Q. You may state to the jury, as fully and in detail as you can, in what ways and to what extent, both as to advertising patronage and to circulation, an afternoon or evening paper comes in contact and competition with a morning paper.

A. There is practically a competition between a morning

111 and an afternoon paper in circulation. A great many people take both morning and afternoon papers. In advertising the competition comes in chiefly in the matter of which shall give the greatest proportion for the amount of money a person or individual has appropriated for advertising.

Q. Let me ask you if the advertising is not based largely on the circulation or the prices paid for it?

A. That is the argument used with the advertiser in soliciting his advertisement—is the amount of circulation—and it is generally the basis on which the man who advertises spends his money. He generally spends his money in proportion to the amount of circulation he can get and what it will cost him. As a rule, afternoon papers furnish advertising cheaper per thousand circulation than morning papers.

Q. I will ask you if the circulation is based to a considerable extent upon the character of newspaper that can be given to the public.

A. The circulation is based, of course, almost exclusively on the character of the newspaper. It is merchandise, and sold just as any

other merchandise is sold. If it is satisfactory the people buy it, and it enlarges its circulation.

Q. To that extent, then, in the matter of advertising and making a good newspaper, it comes in contact with the morning paper?

A. Yes, sir; it would compete with the morning paper, of course, for advertising purposes and making a showing of circulation.

112 Q. Referring to newspapers in some of the larger cities—Kansas City, for instance—I will ask you if you know whether or not it is a fact that an evening paper, by making it a very good paper, does not to a certain extent supplant the circulation of the morning paper?

Counsel for the defendant objects to the attorney specifying Kansas City in his question.

Q. Well, just from your knowledge.

A. That has been the tendency of late years in newspapers, for the afternoon paper to secure more for it in proportion to the morning paper, and to some extent supplant them for business purposes and popularity generally.

Q. And in that respect it would come in competition with morning papers?

A. Yes, sir.

Cross-examination.

By Mr. ESTABROOK:

Q. An evening paper is supposed to cover a field—its object is to cover a field different from the morning paper, isn't it?

A. I do not understand it so.

Q. What is the object, then, of the afternoon paper—to get the news of that part of the day, isn't it, up to a certain time?

A. The object of the establishment of all papers is to estab-

113 lish a business.

Q. Surely, but what field do they purpose to cover?

A. The term field in journalism means the people whose wants you will cater to; it is not applied to its work done.

Q. As I understand you to say, however, there is practically no competition between morning and evening papers as far as circulation is concerned; it reaches a different class of circulation, the different papers?

A. No; I mean the same parties. What I mean, if I may explain myself exactly, what I mean to say is two morning papers compete for circulation with each other, and two evening papers compete with each other for circulation, but there is very little direct competition between a morning paper and an afternoon paper for circulation, for the reason that if both are good the great majority of subscribers will take both.

Q. And the amount of circulation of them, of either the morning or evening paper—not of two morning papers or two evening papers—but of a morning or evening paper, depends upon the quality of the paper, doesn't it?

A. To some extent only, something upon the course in which it is managed.

Q. The manager has a great deal to do with your sales?

A. The editor, I have no doubt.

Q. Do you know of any great paper that competes with a morning paper or any other whose telegraphic expenses for the month are from $75 to $100?

A. I don't know of any great paper whose expenses are within three or four hundred dollars a month.

114 Q. The paper that you were with so long, the Journal, it has two associations which it belongs to?

A. I don't understand so.

Q. Do you know what its telegraph expenses are per month?

A. I only know from common report. I don't know of my own absolute knowledge.

Q. You were about to state, after having stated that the price paid to the Western Union was $125 by the Journal, the amount paid for their franchise per month; what is that?

A. That is $20 per month.

Q. Twenty-five, isn't it?

A. Twenty; $125 to the telegraph company and $20 to the Press Association.

Q. And that is for the morning news?

A. That is for the entire report. That was no afternoon paper taking them at that time.

Q. It was sent to the morning paper?

A. Yes; and with the privilege of using the entire report.

Q. This is for the evening paper and is exclusive, isn't it—the franchise that Mr. Cox has got—that you got?

A. It is exclusive as to use for afternoon purposes.

Q. Did you ever see the contract between the Journal and the Press Association?

A. I think I have, but I wouldn't be positive about it.

Q. Do you remember the number of words it called for?

115 A. I think the Journal contract called—and I do not make this answer from my recollection of what the contents of the contract were, but from my recollection of what I was expected to get from the telegraph company—in the beginning the contract called for not less than 6,500 words per day, and it was very often exceeded, as a matter of fact; averaged probably 700 to 7,500 words.

By Mr. STEWART:

Q. That was prior to the starting of your paper?

A. Yes, sir.

By Mr. ESTABROOK:

Q. Are you acquainted with the service over other telegraph lines and for other reports—for instance, the United Press report?

A. In a general way; yes, sir.

Q. That originates in Chicago, the same as this, doesn't it?

Counsel for plaintiff objects as not proper cross-examination and moves to strike out the answer of the witness. Question withdrawn.

Q. In answer to an interrogatory on direct examination you said you first obtained the price of the Western Union before purchasing the franchise?

A. Yes sir.

Q. Were you not directed to do that by the Press Association?

A. No, sir; I was not directed at all, if I may state the
116 direction as near as I can remember it. I was publishing the Daily State Democrat at that time. We were using plate matter. Desiring to purchase a franchise, I wrote to Mr. William Henry Smith or to his Chicago office, making inquiries as to what it would cost me, and he informed me. I don't remember after how much correspondence, but it took some time to convince Mr. Smith that I really wanted it and was able to pay for it, and he suggested to me, if I remember correctly, and I think I do, that I would better ascertain what the telegraph company would tax me for the report before I spent any money for the franchise. I wrote to Mr. Dicket upon that. He was the local superintendent of this division at Omaha for the Western Union, and he informed me the lowest price that could be charged would be $75.00 a month. After some dickering and attempt on my part to make it cheaper, I accepted that as conclusive and thereupon purchased the franchise and paid the money without any further arrangement.

Q. Now, prior to this time you had been on the Journal, had you, and knew all about that?

A. I was on the Journal up to the first of August, 1886.

Q. And you knew what they were going to charge you therefor, and entered into the contract knowing that?

A. I did not ever get a contract. I simply——

Q. A verbal contract. You simply accepted the proposition?

A. The telegraph company's contract is with the Associated
Press. I had no contract with the telegraph company. They were compelled to deliver me the dispatches on the payment of
117 the tolls. There was no arrangement necessary between the telegraph company and myself except that I should pay for the dispatches at the end of each month or they would withhold them.

Q. And how much?

A. $75.

Q. That was a matter of contract, wasn't it?

A. I hardly feel competent to define a contract. That is the fact.

Q. You were told you couldn't have them for any less?

A. Yes.

Q. Anyhow you accepted it and bought your franchise?

A. I bought the franchise at any rate and paid my $75.

Q. And you during that time never found any fault with this, did you?

A. I most assuredly did.

Q. When; ever in writing?

A. I would not be sure about that. I think I reported to Mr. Dicke*r* that the paper at Atchison was getting a similar report for $55, without any effect on him.

Q. Did you write to Mr. Dickey?

A. I think I did not. I may have confined myself to a conversation with the local agent at Lincoln.

Q. Do you know whether this Atchison paper was getting this same thing for $55 or not?

A. That was my understanding.

Q. Do you know anything about it?

118 A. I don't know of my own knowledge, of course. I wasn't in Atchison to see this party.

By Mr. STEWART:

Q. This $55 paid in Atchison was added to the toll?

Mr. Estabrook, for the defendant, objects to the question and asks to have it stricken out.

Sustained. Exception.

By Mr. ESTABROOK:

Q. You are editing a paper here now?

A. Yes, sir.

Q. What is it called?

A. It is called the Weekly Herald.

Witness excused.

119 H. M. BUSHNELL, recalled on behalf of plaintiff, testified as follows:

Examined by Mr. STEWART:

Q. Mr. Bushnell, during the period covered by from 1888 to 1891 I will ask you if the defendant, or if you received from the defendant, any services for special telegrams, and in the way of special telegrams?

Mr. ESTABROOK: The defendant objects as irrelevant and immaterial, because it has nothing to do with the issues in this case.

Overruled. Exception.

A. We had business with them and received special messages.

Q. Now, what did these special messages consist of—what was the character of them?

A. Their character was news matters from localities probably in the State that the Associated Press did not cover.

Q. What difference in rate, if any, did the defendant make between specials transmitted to you in the daytime and those transmitted at night?

Mr. ESTABROOK: The defendant objects as irrelevant and immaterial, not within the issues in this case.

Overruled. Exception.

120 A. The difference made was they charged practically a half rate for night specials as compared with the rate for day specials. I think in long-distance work there wasn't quite that difference made; but my recollection is that it was practically a half rate for night of that of the day.

Cross-examination.

Examined by Mr. ESTABROOK:

Q. What did they charge you for the day-rate specials; how many words for a cent?

A. My recollection is that it was cent a word in the daytime and a half a cent at night.

Q. Within this State, you mean?

A. Well, practically all our specials were State work.

Q. Where the ordinary rate for commercial messages would be two and a half cents a word for ten words they charged you a cent a word for newspaper specials?

A. That was the rate for newspaper specials.

Q. These specials consisted of all the way from forty to one hundred words, didn't they?

A. Yes, sir; and under that.

Q. And they were, as a general rule, practically all of them
121 more than ten words or the ordinary commercial message?

A. Yes; there would be more than ten words usually.

Q. They were not put in an envelope and delivered to you by messenger?

A. No, sir—yes, I think they were.

Q. Didn't they come in with your regular batch of dispatches?

A. No; I think they was delivered.

Q. So the newspapers paid a cent a word for specials in the daytime and a half a cent at night, and in the Associated Press you got five to six words for a cent during the daytime?

A. Yes, sir.

Q. What inference do you draw from that?

A. That the Associated Press business was a large volume of business, much larger than the State business, and they could afford to do it cheaper than special work, and for the same reason that they could do special work cheaper than they could commercial business.

Q. That is your idea of it, is it?

A. Yes, sir.

Q. What is your object in relating here before this jury that you got specials here, in this State, for a cent a word in the daytime and a half a cent at night?

A. I should draw this inference, that if the Western Union Telegraph Company could afford to handle the day specials for double the night specials, that they could handle the Associated
122 Press reports for at least the same proportion without charging five times as much.

Q. These specials you mention come from little towns within the State?

A. Yes, sir.

Q. For instance, one little dispatch would hail from Hastings and the next from some other point, and they would all come here into Lincoln at your office?

A. Yes, sir.

Q. Now, doesn't the Press—Associated Press—commence at Chicago and go right out on a wire of its own without this interruption and without this breaking in and interference, like you have to do from these small towns, every time you send a telegram to Lincoln?

A. Well, that is asking me about your method of doing business. I understand, though, from hearsay.

Q. Isn't it a fact that the Associated Press news comes to both papers without interruption, and your specials come from different points in the State to both papers?

A. No; I think the special work and the Associated Press is exactly alike, both day and night, only the Press reports, of course, are on a larger scale, and there is more of them.

Q. Mr. Bushnell, these specials that you get from this State and these various little towns are sent direct to your paper and not to any other paper?

A. Yes, sir.

123 Q. They are yours exclusively?

A. Yes, sir.

Q. The press dispatches, both morning and night or afternoon and night, are sent to a number of papers, are they not—the same identical dispatches?

A. Yes, sir.

Q. How much do you guess, think, or otherwise speculate that we ought to charge for our day services?

A. I don't guess, speculate, or think.

Q. Do you know anything about it, then—the conditions, or anything about it?

A. All I know is, if the conditions are alike, if you can carry messages in the day for the double the night rate, or two messages, you ought to carry the press dispatches on the same rate instead of charging five times as much.

Q. Do you say the conditions are alike for messages delivered to your paper during the daytime and messages delivered to the Journal at night?

A. The conditions are alike as between specials sent to us and specials sent to the Journal.

Q. Do you mean to tell this jury that we charge you more for specials than we do the Journal?

A. You charge us double for day specials and five times as much for press work as you do the Journal.

Q. Then, as I understand, your present complaint is that

124 we ought to have charged the Journal the same for night specials as we do you for the day specials?

A. No, sir.

Q. Then that we ought to have charged you the same for day specials as we did the Journal for night specials?

A. No, sir.

Q. Then what in hades had we ought to have done?

A. You had a right, as far as I know, to make your rate for day specials and night specials. I am not saying whether your rate for day specials and night specials were justifiable or not.

Q. Then you are not complaining to this jury that we charged you more than we should because we charged you as much again as we did the Journal for night work?

A. No; I am not complaining.

Q. Do you claim that we ought to send you the Associated Press dispatches, fifteen hundred words, for the same rate that we send the night dispatches to the Journal?

A. I don't know as you can; that is a matter for you to say, whether you can afford to do the work in the night-time cheaper than in the daytime.

Q. You didn't put night dispatches in your paper, copied from the Journal when you wanted to, did you?

A. We usually made a résumé, but not by copying it; we made a sort of a compilation of the news.

125 Q. But you got your information by which you made this compilation from the telegrams in the morning papers?

A. Not in any one morning paper; made it from three or four morning papers; from any of the morning papers that we could have compiled it from.

Redirect examination.

Examined by Mr. STEWART:

Q. You mean by that that you would rewrite the dispatches?

A. We run a column in our paper that we called the news of the day and made it brief—that is, we would make a line or two or three lines, take it out of the morning dispatch in the papers, take it out of the morning papers, and would always do what we could to get fresh news in the afternoon; but the other news we would boil down in a half a column or such a matter to supplement for the next day's report, and would connect the news from day to day.

Q. I believe you stated that you claimed that the defendant company ought to apply the same rule to the press matters as to day and night service as to special service?

A. Yes, sir.

126 Q. You say they delivered to more than one paper all the afternoon dispatches. That would make the rate cheaper?

A. Yes, sir.

Q. That is, having got forty or fifty dollars from the Journal for the afternoon reports, and for you to give seventy-five dollars for the same service, why you claim that that would lessen the cost to the company?

A. I should think so.

Q. Enable them to furnish it cheaper than to one alone?
A. Yes, sir.

Witness excused.

127 J. C. SEACREST, being called and duly sworn on behalf of plaintiff, testified as follows:

Examined by Mr. STEWART:

Q. Where do you reside?
A. Lincoln.
Q. What is your occupation?
A. Working for the State Journal.
Q. In what capacity?
A. Business manager.
Q. I wish to inquire in regard to the special services that the Journal receives from the Western Union Telegraph Company. It receives some such service, doesn't it?
A. Yes, sir.
Q. What does that consist of?

Mr. ESTABROOK: The defendant objects as irrelevant and immaterial; not responses to any of the issues in this case.
Overruled. Exception.

A. It consists of special telegrams from different points.
Q. In this State and others?
A. Yes, sir.

128 Q. I will ask you to state what difference there was between the Western Union Telegraph Company rates to the State Journal between day and night rates for such specials.

Mr. ESTABROOK: The defendant objects as irrelevant and immaterial and not responsive to the issues in this case.
Overruled. Exception.

A. We pay twice as much for the day stuff as we do for night.
Q. Double?
A. Double; yes, sir.

Cross-examination.

Examined by Mr. ESTABROOK:

Q. You do get day specials sometimes?
A. Just a few. Some correspondent doesn't understand his business, and we get a few in the daytime.
Q. When you do they charge you day rates?
A. Day rates; yes, sir.
Q. How much is it a word—day rates from points in Nebraska, say?

129 A. Two-thirds of a cent, day rates.
Q. And outside of Nebraska?
A. Of course, that would depend altogether on the distance it came.

Q. Well, say from Chicago.

A. I don't recall the day rates from Chicago. The day rate from Deadwood, I think, is a cent.

Q. And the night rate a half a cent?

A. Yes, sir.

Q. And the night rate in Nebraska?

A. One-third of a cent.

Q. And the day rate two-thirds?

A. Yes, sir.

Q. You have a contract, have you not, with the Press Association?

A. Yes, sir.

Q. You are now with the United Press Association, and formerly received your dispatches over the Postal line?

A. Yes, sir.

Q. I will ask you, Mr. Seacrest, if the rates on the Postal were for specials, what they were—how they correspond?

A. They were the same rates.

Q. No lower, no higher?

A. Just the same rate.

Q. On the Associated Press dispatches you received for the night service, do you remember the rate?

130 A. No, sir; I wasn't in charge then.

Q. You have dealt with both companies now in business?

A. Yes, sir.

Q. Have you ever received the day press reports over the Postal?

A. No; nothing except occasionally a day special.

Q. Aren't you the owners of the United day franchise?

A. Yes, sir.

Q. But you never use it?

A. No, sir.

Q. Why not?

A. Never had any afternoon paper.

Q. You were at one time contemplating establishing an afternoon daily, and you then investigated to see what you could get the afternoon report for, did you not?

A. I didn't; Mr. Hathaway did.

Q. And communicated with the Postal?

A. Yes, sir; I understand so.

Q. And it was on that communication that he gave up the idea of starting an afternoon paper at all, didn't he?

A. No; I think not.

Q. It had something to do with it, didn't it?

A. Yes, sir.

Q. Now, this newspaper franchise to which you have referred, I will ask you whether it is copyrighted matter that they could buy.

131 A. No.

Q. Now, you make an agreement with this Press Association, don't you?

Mr. STEWART: The plaintiff objects as not proper cross-examination.

Sustained. Exception.

Witness excused.

132 J. C. SEACREST, recalled on behalf of defendant, testifies as follows:

Examined by Mr. ESTABROOK:

Q. Your contract with this association to furnish you a certain number of words, have you that contract?

A. No.

Q. Have you the old contract between you and the Associated Press?

A. No.

Q. You know about what it was?

A. No; I don't; Mr. Hathaway had entire charge of that.

Q. Your contract was not with the telegraph company directly, but through the association; they agreed to give you so many words for a certain time?

A. I don't know whether anything in the contract stipulated in reference to words or not. It was just this report; of course, that varies very largely.

Witness excused.

133 By Mr. STEWART: The plaintiff now offers in evidence contract between the Western Union Telegraph Company and the Northwestern Press Association, found on pages 62, 63, 64, 65, 66, and 67 of the bill of exceptions of the former trial of this case.

Mr. ESTABROOK: The defendant admits the contract in evidence without objection.

Said contract is marked Exhibit "B," and is found on page 197 of the bill of exceptions.

The above Exhibit "B" is here read to the jury.

Plaintiff rests.

134 A. E. CARLTON, being produced and duly sworn on behalf of defendant, testifies as follows:

Examined by Mr. ESTABROOK:

Q. You may state your full name, Mr. Carlton.

A. A. E. Carlton.

Q. What is your business?

A. Why, I am commonly known as a telegraph operator.

Q. What is your position with the Western Union?

A. Chief operator at Lincoln, Nebraska.

Q. How long have you lived in Lincoln, Nebraska?

A. Since January, 1885.

Q. During that time have you been employed by the Western Union as an operator?

A. Constantly.

Q. In January, 1885, how many operators were employed by the Western Union Telegraph Company?

A. Two, not including the manager.

Q. Did the manager operate?

A. He could, but didn't.

Q. One for night and one for day, you mean?

A. Yes, sir.

Q. How many were employed in 1886?

A. One day and one night and the manager.

135 Q. How many were employed in 1890 or 1892 or 1893, along there?

A. I think about twelve, not including the manager.

Q. So that in the space of four or five years the business grew from the employment of but one operator to the employment of ten or twelve, not including the manager?

A. Yes, sir.

Q. In 1885 how many wires did the Western Union Company have between Lincoln and Omaha?

A. Two.

Q. What were they called?

A. U. P. number four and five.

Q. Was U. P. number four used for commercial business?

A. No, sir; railroad business exclusively.

Q. Then the only commercial wire on which you received commercial or newspaper business was U. P. number five?

A. Yes, sir.

Q. When was the second wire erected between Omaha and Lincoln?

A. I think it was placed in our office here in May or June, in 1887.

Q. What is that known as?

A. Missouri Pacific number eight.

Q. There are now, since that date, a good many more wires, are there not—private wires?

A. During the daytime we have quite a number of wires that we lease.

136 Q. That is, wires that you lease to the exclusive use of individuals?

A. During the daytime; yes, sir.

Q. That is the case all over the country, is it not?

A. As I understand it.

Q. Did you receive for the use of the State Journal, in 1885 and 1886, the Associated Press afternoon dispatches from Omaha?

A. We did; yes, sir.

Q. Those were brought over what wires in those two years?

A. Union Pacific number five.

Q. In connection with whatever commercial business you handled?

A. Yes, sir.

Q. Was there an effort made on the part of the company to obtain that at any particular time?

A. It wasn't my understanding.

Q. Was there on the part of the office—here at this office?

A. There was not.

Q. Did you take the report?

A. Yes, sir.

Q. You were the sole operator, were you not?

A. Yes, sir.

Q. You received and sent all that was received here at this office during those years?

137 A. I did during the daytime.

Q. Which had precedence in the daytime—the commercial messages that were sent or received here or the afternoon reports?

A. The commercial messages.

Q. Was Lincoln at that time or up until 1887—that is to say, during the years 1885, 1886, and 1887 was Lincoln on any circuit for the day report of the Associated Press?

A. Not on any circuit. We got it from Omaha.

Q. How did it come from Omaha?

A. It was relayed and sent by an operator from Omaha.

Q. As a matter of fact, Mr. Carlton, what time of the day was it that you usually received the afternoon press report—that is to say, between what hours, as the general rule?

A. You mean taking in the years 1885 and 1886?

Q. Yes, sir.

A. We would start in sometimes after eleven o'clock and get to "30" any time between that an-, six o'clock. Sometimes I have gone home at six o'clock, and the other man would come along, and he would get "30" after I would leave.

Q. Your hours were up at six o'clock?

A. Yes, sir.

Q. Was there any uniformity in the hours at which you would receive "30"?

A. Not during 1885 and 1886.

138 Q. In 1887 you say the Missouri Pacific number eight was built?

A. It was in 1887; yes, sir.

Q. You know why that was built?

A. An increase in the volume of business was one thing, and we were to—instead of taking one copy of the afternoon report we were to take two, and we were to have "30" quoted, as I understood it——

Mr. STEWART: We object to witness stating what his understanding was.

A.—we were to have "30" at or about three o'clock in the afternood, and in order to do that we couldn't do it with our former facilities.

Q. Mr. Carlton, when was the second operator employed?

A. I can't give the exact date or the exact month.

Q. I will ask you whether it was before or after the erection of the Missouri Pacific number eight.

A. It was after the erection of the Missouri Pacific number eight.

Q. Was the afternoon report after the erection of the Missouri Pacific number eight relayed at Omaha?

A. For a short time it was; I can't state just how long.

Q. Over what wire did it come?

A. Missouri Pacific number eight.

Q. During the hours that it was sent, which had preference, commercial message- or the press reports?

139 A. Well, during 1887 they wasn't sent over the same wire. The commercial business and afternoon report wasn't sent on the same wire. One wire was for commercial business and one for the afternoon report.

Q. So they weren't permitted to collide?

A. No, sir.

Q. Did the receiving and taking of that afternoon report, so as to receive "30" promptly at or before half past three, necessitate the employment of an extra operator?

A. It necessitated the employment of one additional man.

Q. You know who he was?

A. His name was Bert Manchester.

Q. How much did he receive?

A. I think they employed him at first at $55 a month.

Q. Does it today necessitate the employment of one extra man?

A. Yes, sir.

Q. How much is his salary?

A. Sixty dollars.

Q. How do you know it necessitates this?

A. Well, when the afternoon report was discontinued, for a short time we dispensed with the services of one man.

Q. You kept him up until what time?

A. Until the Call discontinued taking that report.

Q. How long ago was that?

140 A. I can't state just how long. It seems a couple or three months. We dispensed with the services of the sixty-dollar man.

Q. Who was that man?

A. D. N. Syford.

Q. How long was this intervention in the business?

A. I don't think it was over ten days before it resumed.

Q. Then, after it resumed did you empl-y any one?

A. We did; employed the same man at sixty dollars.

Q. Who—Mr. Syford?

A. Yes, sir.

Q. The present Call & Printing Company—Mr. Aitken—is that his name or Austin—I will ask you if he proposed to discontinue the report lately?

Mr. STEWART: The plaintiff objects as improper and immaterial and hearsay.

Overruled. Exception.

A. He did.

Q. What, if any, steps were taken at that time, Mr. Carlton, towards the stoppage of that report?

Mr. STEWART: The plaintiff objects as incompetent, irrelevant, and immaterial.

141 Overruled. Exception.

A. I received instructions from the manager——

Mr. STEWART: Were those instructions in writing?

A. Yes, sir.

Mr. STEWART: The plaintiff objects as not the best evidence.

Mr. ESTABROOK: Can you get the writing?

A. I think not.

Q. What became of it?

A. I presume I tore it up.

Q. Was it simply a note?

A. Simply a note; yes, sir.

Q. Don't know where it is?

A. No, sir.

Q. I will ask you to give the contents of that paper.

Mr. STEWART: The plaintiff objects as incompetent, irrelevant and immaterial, no foundation laid, and not the best evidence.

By the WITNESS: It is not in my possession.

Objection overruled. Plaintiff excepts.

142 A. I can give the contents of the note, I think, word for word.

Mr. STEWART: The plaintiff objects as incompetent, irrelevant, and immaterial, for the reason that if any action was taken by the general manager here that he would be the most competent witness, and for the further reason that it is hearsay.

Overruled. Exception.

Q. Who discharges the operators?

A. I do.

Q. You are chief operator, are you?

A. Yes, sir.

Q. Now, I will ask you what the duties of the manager are in the way of intimating what the expense must be?

A. He governs that—so far as I am concerned, he governs that part of it. He says in view of the fact that the Call——

Mr. STEWART: Is this what the general manager says?

A. Yes, sir.

Mr. STEWART: The plaintiff objects as incompetent, irrelevant, and immaterial and hearsay.

Sustained. Exception.

A. —He says to so arrange my force as to drop a sixty-dollar man tomorrow—that is, the day following the request to stop the report.

143 Q. Did the Call stop the report?

A. They did not. I had arrangements to drop a man, and I got notice that the Call would continue, and we kept the man in our employ.

Q. Mr. Carlton, I will ask you whether those reports that are being received by the Lincoln Call now are the same reports that were being received by the Democrat in 1887.

A. It is the same.

Q. I will ask you then whether, as a matter of fact, there would be required a sixty-dollar operator there and your present force if this report was discontinued or permitted to be sent out at the convenience of the company.

STEWART: The plaintiff objects as incompetent, irrelevant, and immaterial, and no foundation laid, and calling for a conclusion of the witness.

Overruled. Exception.

A. *Ss* we take the report now, it is our aim to get "30" about three o'clock. We start in about eleven o'clock. It is not sent the same as the night report is. The night report—as a rule, the matter is quite a good deal in the hands of the parties, who make it up in Chicago about the time they start it, and they keep the sending operator supplied with a copy all during the night, and the

144 day report is not made out in that way; they send it just as they get it in, send one item and wait for another, and there will be a time intervening, maybe, of fifteen, twenty, or thirty minutes, but we have to keep a man there all the time, whereas if it was all ready and collected and could be sent without any intermission they could send it all in about an hour, and we could dispose of the services of that day man, of that sixty-dollar man.

Q. Mr. Carlton, at night-time you spoke some time ago about the company having private wires. Have they any between here and Omaha?

A. They have.

Q. What are they leased for?

A. Well, they are leased to grainmen—these commission houses.

Q. Bucket shops?

A. Commonly called bucket shops.

Q. What are the hours for which they are leased?

A. Eight-thirty in the morning to five o'clock in the afternoon.

Q. After that time, I will ask you whether or not the company uses them for its business.

A. We take them in our service after that time; yes, sir.

Q. Is there any reason, Mr. Carlton, why a message can be and is sent cheaper at night than it is in the daytime?

145 A. Well, the reason is that the volume of business is not so great at night as it is in the daytime. The amount of business at night will amount to a little over one-third of what it will during the entire day, and the wires are not so many in use and not so busy, and the force has more time.

Q. So at night there are two-thirds the amount of facilities than in the daytime—two-thirds more, I mean?

A. About that.

Q. Is there any reason why newspaper reports and press reports should be sent and can be sent cheaper than commercial business?

A. I don't know as to that. Take it so far as the night report is concerned, it is about a continuous stream, and there isn't so much work about it, doesn't go through so many hours nor through so many hands. Take the commercial business, and a telegram here is taken in downstairs and is then taken upstairs and taken into a box, all checked off, sent to the operator, taken back one way, and sent downstairs, rates put on by book-keeper, and filed in the cupboard.

Q. Then at the other end of the line, after it is sent?

A. The same thing has to be done at the other end. It is sent downstairs, put in an envelope, and copied and delivered to a messenger, to be delivered to the proper party, and the Associated
146 Press takes up the time of one man at one end; that is about all the time that is required.

Q. At night?

A. At night or in the daytime. We didn't deliver; we didn't copy it; didn't keep any track of it in the office record; we didn't book it, or anything.

Q. Then about the only difference between the newspaper work between the day and night is the facility for handling?

A. Yes, sir.

Q. If the companies, then, *and* ample wires, that were not in use in the daytime for mercantile business and more lucrative business, they could afford to take it in the daytime, so far as you know, as nearly as the rates they would as night?

A. Well, so far as the company is concerned in their part of handling it, taking it by an operator, I should think yes; but so far as taking it and handling it, I don't know.

Q. I mean by the former question, Mr. Carlton, that if the company had these private wires—that is, had the same number of wires in the daytime as they have at night—they would have the same facilities for handling this business?

A. Why, yes.

Q. In other words, there is no particular reason why they could not be sent in the daytime as cheap as night except for the lack of facilities, and because the number of newspapers are not the same and the number of words are not the same?

147 A. It is probably on account of these facilities, for we take the afternoon and night report, and the night report is probably three or four times as much as that of the day.

By the COURT: Could you do three or four times as much on the same wire?

A. I mean by that that the company would receive three or four times as much pay for the use of the wire for something else that they did for using it for the afternoon report; for instance, if they leased the wire.

Q. Do you know what the charges are for leased wires between here and Omaha, say?

A. I couldn't be positive; I think I know, but I couldn't be positive about that. I think I can answer that question.

Q. You say you think you know?

A. I think I know, but at the same time I wouldn't be positive.

Cross-examination:

Examined by Mr. STEWART:

148 Q. You know what the bucket shows pay for wires between here and Chicago?

A. I do not, sir.

Q. Have you prior to coming on the witness stand talked this matter over with Mr. Estabrook—have you?

A. Well, in a general way. I met him yesterday at noon—shortly after noon—and he asked me some questions—how long I have been here, and so forth—but I didn't need to be prompted by anybody; I have been in the business for twenty-five years.

Q. He asked you some questions?

A. He asked me a few questions—yes, sir—in a general way.

Q. Didn't he coach you any?

A. I don't recall now that he put anything in my mouth to say.

Q. Didn't he tell you what he wanted to show?

A. I don't think that he did.

Q. When you say that—how long were you connected with this office?

A. About twelve years.

Q. Continuously?

A. Yes, sir.

Q. How long have you been chief operator?

A. Since, I think, July 22, 1889.

Q. And how many men were employed then in the office, in 1889?

149 A. Well, as I said before, ten or twelve, not including the manager.

Q. Ten or twelve, exclusive of the manager?

A. Yes; both day and night.

Q. How many day and how many night?

A. If they had twelve, there would be about eight in the daytime and four at night.

Q. How many wires did you say you had between here and Omaha in 1885 and in 1886?

A. Two.

Q. And you put the third one on in 1887?

A. I think in May or June, 1887.

Q. How do you fix the date?

A. Well, I fix the date, for Mr. Patterson, who is the chief operators in Omaha, came down here and did some work in the office, and he went down on Saturday, and we went out on Sunday with

a young lady, and it was the time we had some pretty nice flowers that were blooming, so I think it was in May or June.

Q. How do you fix the year?

A. From the fact that I know it was 1887.

Q. Well, how do you fix that date—I mean as to the year—it was a good while ago?

A. I know no particular way, only I know it was in 1887.

Q. Still you don't know how many men were employed in 1887?

150 A. I couldn't say positive, because the number would fluctuate.

Q. How many in 1887, if you remember?

A. Three besides the manager; three in the daytime and one at night.

Q. And how many were employed in 1888?

A. I am taking this all from memory. It is a good while back.

Q. If you don't remember, just say so.

A. I don't remember.

Q. How many were employed in 1889?

A. Day and night, including myself, I should think there was ten or twelve.

Q. What makes you think that many?

A. Just judging from the amount of wires we had to work.

Q. What did you say this wire was that was put up in 1887?

A. Missouri Pacific number 8.

Q. That was put up along the Missouri Pacific road, wasn't it?

A. I couldn't state what road it run on.

Q. It wouldn't be called the Missouri Pacific wire, would it, unless it was on that road?

A. Well, hardly, but I can't state.

Q. You know how many wires are on the Missouri Pacific?

A. That comes in this town, only two.

Q. One a railroad wire?

151 A. One railroad wire and one commercial wire.

Q. And the commercial wire was number eight?

A. Yes, sir.

Q. Then you do know that that wire was put on that road?

A. Well, that is my opinion, but I never followed the wire up to find out.

Q. Was that wire put there when the Missouri Pacific road was built into Lincoln?

A. That I couldn't state.

Q. You know when the Missouri Pacific was built into Lincoln?

A. I think it was completed some time in 1887.

Q. You might be mistaken as to that?

A. I might be mistaken.

Q. But couldn't be mistaken as to the year when this wire was put in?

A. Not the year; I might the month.

Q. You remember the fact of the Missouri Pacific being built here?

A. Yes, sir.

Q. But you don't know what year it was?

A. Not when it was completed.

Q. But you could fix the date when that wire was put in town to the month of May or June?

A. No, sir; I might be mistaken.

152 Q. So, then, two Western Union wires between here and Omaha were the only ones which the Western Union used?

A. Just two.

Q. You spoke of having two wires between here and Omaha in 1885 and 1886.

A. I don't claim they had two. I claim there was two wires between Lincoln and Omaha, but one was exclusively for railroad and the other was used by the Missouri Pacific for train business. We used number five for commercial business.

Q. But how many wires did the Western Union have between Lincoln and Omaha during those years?

A. I only know of two.

Q. What two?

A. Missouri Pacific number eight and Union Pacific number five.

Q. Didn't you have any other wires; didn't you have one along the B. & M.?

A. Not that I know of.

Q. No other wire coming from Omaha?

A. Not that I know of.

Q. Do you know whether there was or not?

A. No, sir.

Q. You say this wire—Union Pacific number four—was used entirely for railroad business?

153 A. I do.

Q. What is the fact about that being used by the telegraph company?

A. I never used it. It might be used in case of extreme emergencies, when something special was going on or something like that, but it was considered to be used only for railroad business.

Q. Do you mean to tell this jury that in 1885 and 1886 the Western Union had no wire along the B. & M. between Lincoln and Omaha?

A. I don't mean to tell them whether they did or not. I don't know anything about it.

Q. I thought you told the jury a while ago, Mr. Carlton, that they only had one wire between here and Omaha. Now, do you know whether they had any more or not?

A. I don't know any more than I said.

Q. They you want to take back the statement they had only one wire?

A. I do not. So far as I know, they had only the one wire to work on. They might have had more than that, but it was hardly possible.

Q. It was hardly possible that they had one along the B. & M.?

A. I don't think they did.

Q. Do you know how they got dispatches along the towns
154 between here and Omaha on the B. & M.?

A. I do not.

Q. And yet you worked in the office?

A. Yes, sir.

Q. Don't you know whether they sent dispatches to Ashland and along the B. & M.?

A. I suppose you have been here long enough to know that the Western Union doesn't handle the business of the B. & M.

Q. Don't make the towns along their road?

A. No, sir.

Q. Mr. Zeimer can attend to that business at 10th & "O"?

—. ——

Q. You state that the Western Union didn't have any line along the road of the B. & M. in 1885 and 1886?

A. We don't report that.

Q. Well, did you state they didn't have any wire?

A. Not to my knowledge.

Q. You know whether they have got them there now or not?

A. I do; but I don't know when they were put there.

Q. How does it happen that you can fix the exact date of this one wire—Missouri Pacific number seven—and don't know when any of the rest of the wires were put in?

A. You haven't asked me the question yet. You asked me if I knew when they put them on the B. & M.

Q. Yes, sir.

A. And I said I couldn't tell you.

155 Q. There wasn't any flowers in that case to fix the time?

A. No, sir.

Q. How many wires has the Western Union on the B. & M. road between here and Omaha now?

A. They have got two; that is all that I know—Union Pacific number four and number five.

Q. On the B. & M.?

A. No; Missouri Pacific.

Q. Well, on the B. & M. I asked you how many wires they have between here and Omaha on the B. & M.

A. Well, they have running in our office four. They have other wires that don't come into our office.

Q. That is, the Western Union Telegraph Company have four wires between here and Omaha?

A. Yes, sir.

Q. Are those exclusively with the Union wires or jointly with the railroad company?

A. Both us- them.

Q. That is, the company do their business on these wires and the railroad company uses them for its business?

A. Yes, sir.

Q. How many wires did the Western Union have between here and Omaha in January of 1887?

A. How many did the Western Union have?

Q. Yes, sir.

156 A. I wouldn't be positive, but I think the one wire they used—Union Pacific number five—is all they had.

Q. Do you know they didn't have any other wire?

A. I don't know.

Q. When you took this afternoon report in 1885 and 1886, you say it was relayed at Omaha?

A. It was.

Q. That is—what do you mean by its being relayed?

A. Well, I mean that it was sent to Omaha.

Q. From where?

A. That I don't know; I presume from Chicago, and Omaha furnished an operator for Chicago to receive it from Chicago, and then they sent it over to Lincoln instead of us taking it direct from Chicago.

Q. How many men did it take to do that?

A. You mean to perform that service; get that report from Chicago to Lincoln?

A. Yes, sir.

Q. In case it was taken direct from Chicago to Omaha, that would take two men. I don't know that Omaha got it direct from Chicago, but in case that it did it would take two men, and to send it to Lincoln would take two men. That would make four men.

Q. And if they sent it direct to Lincoln from Chicago, how many men would it take?

157 A. Take the services of two men.

Q. Do you remember just when the- began sending it direct from Chicago and stopped relaying it at Omaha?

A. I do not.

Q. While you took it, you say, it would take about an hour of actual work to take the report?

A. No; I didn't say that.

Q. If it came continuously it would take about an hour?

A. Well, it would be sent in an hour if they had the right kind of man to send it and to receive it.

Q. Well, a competent operator?

A. Yes; a competent — could send it in an hour.

Q. You heard Mr. Syford's testimony, did you, in regard to when there would be a let up on the operator to do commercial business?

A. I did.

Q. You do that; do you do that?

A. When I was taking it it was a side issue; I took commercial business and the report both on the same line.

Q. And you never took the report after 1886?

A. Yes; I took the report after 1886, but not much of it; I had commercial work up to the time I was appointed chief operator.

Q. And then what did you do?

A. A little bit of everything.

158 Q. Do any operating?

A. Yes; a little.

Q. Have you taken this day report any considerable time since you quit taking it in 1886?

A. Well, I never have taken it steady; I have taken it for a month or a week or two or three days at a time.

Q. Mr. Syford stated in regard to working at the press report and commercial business—mixing up together with the same man. That is correct, is it?

A. No, sir; it is not.

Q. You don't agree with him on that?

A. No.

Q. Do you say Mr. Syford didn't do any commercial work while doing press work?

A. Did some, but precious little.

Q. Didn't he keep busy all the time?

A. He did not. If he knew there was a let-up for half an hour or so, why, I would take him off and put him on a way wire that runs to some little town, and he would have that wire clear, and he would go back to his report, and he didn't do anything but sit there and wait for the report, and while he took it a good deal of the time he did that.

Q. But if you needed him he did that other class of work?

A. Well, he said we put him on the quad or something like that, and that is not the case.

159 Q. In other words, you say you don't think Mr. Syford knew what he was talking about?

A. I don't say that, but I think he got mixed on that one point.

Q. Sure you are not mistaken on that?

A. I am.

Q. You spoke of getting this afternoon report from sometimes as late as six o'clock or even later than that. What was the usual thing?

A. Well, it wasn't the usual thing. This has reference to 1885, and 1886, it was the usual thing; we got "30" whenever it come. It wasn't the usual thing to get it very much before five at any time. The night edition that the Journal used, it came between five and six.

Q. If Mr. Calhoun testifies in this case that he used to get it there at four o'clock do you think he was mistaken, too?

A. I don't think Mr. Calhoun was on the Journal in 1885 and 1886.

Q. Well, what do you say about that?

A. That may be true.

Q. If he says he was, and always came over there and got that report at four o'clock, you think he was mistaken?

A. I think he was mistaken. I don't think anybody came after it but a Mr. Hayes. I don't think Mr. Calhoun came after it very often.

160 Q. How about Mr. McVicker?

A. Mr. McVicker used to come.

Q. So you wish this jury to understand that the usual time for that report to get there was about five o'clock?

A. Well, I don't want to set any time at all. We got through when it got through coming.

Q. What time did it usually get there?

A. I don't know; any time between eleven o'clock in the morning, and from that until six in the afternoon.

Q. That is as close as you can fix it?

A. That is as close as I can fix it.

Q. How long did you say Mr. Syford was let off?

A. I didn't state positively. I said I thought it was in the neighborhood of—well, I didn't say anything about Mr. Syford being let off until he was let out permanently.

Q. I thought you said he was let off once about ten days.

A. No; I said a sixty-dollar man.

Q. Didn't you say that was Mr. Syford?

A. I did not.

Q. He said that himself, did he?

A. No, sir.

Q. Who was that sixty-dollar man?

A. I don't remember now. We reduced Syford to fifty dollars and put him on different work, and let a sixty-dollar man go.

161 Q. You don't know who the sixty-dollar man was?

A. No, sir.

Q. How long ago was that?

A. That has been—I think it was some time in September last. I am not sure.

Q. When did Syford finally quit?

A. I think in October; wouldn't be positive about that, though.

Q. That is, this last year?

A. Yes, sir; about the eighth of October.

Q. Was that the time that the Call was talking about not taking the reports?

A. No, sir.

Q. When was that?

A. That was when he was let out permanently, on October 8th.

Q. This last year?

A. Yes, sir.

Q. That was when the Call quit taking it?

A. No, sir; that was because we made a change in the man who took the report. I can't state positively when the Call did — taking the report, for a few days before; it seems to me, it was four or five weeks previous to October 8th.

Q. And how long did they quit?

A. I can't state positively. I don't think to exceed ten days.

162 Q. And you say, then, you let out a man?

A. We let out a sixty-dollar man.

Q. And you don't know who that man was?

A. I don't know now.

Q. And then you hired the same man back again after they began taking it?

A. Syford took it when I let out the sixty-dollar man. I reduced Syford's salary from sixty to fifty dollars, and let out a sixty-dollar

man, and when they resumed the report we put Syford back to sixty dollars.

Q. And you don't know who this sixty-dollar man was?

A. No, sir.

Q. And it was just last fall?

A. Yes, sir.

Q. And you don't know who he was?

A. No, sir; I could tell by looking at the record.

Q. What is the fact in regard to the general business of the company outside of the press report, increasing or decreasing during the year 1895?

A. 1895, I can't state.

Q. Can't state that?

A. No, sir; I can't.

Q. You don't know whether it decreased along in the fall of 1895 or not?

A. Oh, I thought you had reference to 1885.

163 Q. No, in 1895.

A. I will say that then general business showed a slight decrease.

Q. How many men did you hire in the fall of 1895, in the daytime?

A. I don't know.

Q. How many operators did you have in the office in the fall of 1895, in the daytime?

A. I think eight; I wouldn't be sure about that, though.

Q. How many at night?

A. Three, and with the split-trick man we had four; he is a man who worked part day and part night.

Q. And you had just one of them?

A. Yes, sir.

Q. How many men did you have in the fore part of 1895; that is, in the day and at night?

A. I couldn't tell you.

Q. Did you have a man, you say, to take the night reports, especially for that purpose?

A. We did.

Q. How long did it take him to do it?

A. From seven until two or three-thirty in the morning.

Q. About five or six hours?

A. Yes, sir.

Q. It would be seven or eight hours, wouldn't it?

A. Seven hours and a half.

164 Q. Did he work continuously at that?

A. No; he didn't work continuously. He didn't do any other kind of work, but he would get a let up for a short time.

Q. That is the only thing he done?

A. Yes, sir.

Q. You know when the Journal stopped getting this afternoon report?

A. I do not; no, sir.

Q. You know whether it was stopped or not?

A. I know it was.

Q. Some years or so ago?

A. Yes, I should think it was two years ago, but wouldn't be positive.

Q. Did you ever take this report at the time the Democrat and Journal both took it, or the Call and Journal both took it?

A. Not as a regular thing, I didn't. I have taken it since I have been here, more or less.

Q. During 1885 and 1886 the Journal was the only one that took it?

A. Yes; they took one copy.

Q. And after the Democrat took it you made a manifold copy?

A. Yes, sir.

By the COURT: You are referring to the afternoon report?

165 A. Yes, sir.

Q. The Call didn't get the night report?

A. No, sir.

Q. I believe you stated, in answer to Mr. Estabrook's question, that the difference in the expense of taking the day and night report is the fact that you had idle wires at night that you could use that you didn't have in the daytime?

A. I didn't state that as a fact: that was simply my opinion. I can't state what the company did or their reasons for doing this. They never consulted me about anything of that kind; that is simply my judgment.

Q. How much do they have to pay this night man that takes the night report?

A. We don't furnish the man that takes the night report now.

Q. Well, when you did furnish him?

A. Seventy dollars a month.

Q. And what did you pay the man that took the day report?

A. Sixty dollars. It was taken, as I said before, for a short time for fifty-five dollars; then we increased it. We have trouble in getting the right kind of a man, and it was increased to sixty dollars.

Q. The night operator usually gets more than the day operators?

A. No, sir.

Q. How, then, is it that they pay more for this night re-

166 port than for the day report?

A. Because he is a better man.

Q. Why does it take a better man?

A. Because it is sent much faster, in the first place.

Q. How many hours does a man have to work for this seventy dollars, a night man?

A. Generally puts in about seven and a half hours.

Q. And for that he gets seventy dollars?

A. Yes, sir.

Q. And how long does a man in the daytime have to work for the sixty dollars?

A. Nine hours. Nine hours constitutes a day's work and seven and a half hours constitutes a night's work.

Q. Well, the day man, I understood you to say, when he is not taking the report, does other work—puts in his nine hours at other work?

A. Well, part of the time he does and part of the time he doesn't. Lots of the time he has a let up, and he doesn't have anything to do, but he sits around there, and in case of any messages to be sent, I have him taken off of the report and put him on those.

Q. Leave all that out, from the time the report commences, say about eleven o'clock, until three o'clock, from eleven until three; and after three what does he do?

A. Generally works around the room there.

167 Q. Operating?

A. Yes, sir; operating, and does odd jobs.

Q. So, if it wasn't for the use of these facilities they really would take the day report a little cheaper than the night report; don't have to pay the man quite so much, and he works longer hours for less pay?

A. I couldn't state as to that. I don't know what the company gets for handling this.

Q. I didn't ask you what compensation they got. So far as the employment of men to take this report is concerned, they can get help cheaper in the daytime than at night?

A. Well, if they could confine themselves strictly to the report and to that alone, I presume they could.

Q. You don't know what the use of the wires are worth, you say?

A. Well, I don't know positively, but I could come very close to it.

Q. You don't know how much they have to pay for a wire between here and Chicago, do you—the bucket shops, do you?

A. I don't think they have any wires between here and Chicago—all the way there—that they pay for.

Q. Well, what do you say about that?

A. I am not positive about that.

Q. You don't know, Mr. Carlton, the reason why the rate for day messages are higher than the rate for night messages?

A. Why, I know the reasons given.

168 Q. Do you know of your own knowledge any reason for making the difference?

A. Why, if I owned the telegraph company and established rates I would know why I would make the rate, and I could give good reasons for doing so, but I am not prepared to say why the Western Union do.

Q. Why would you make a difference?

A. The volume of business is much greater in the daytime than at night, and the day message filed has to be sent immediately and delivered immediately, while the night message, at six o'clock or after—that telegram can be sent at any time from six o'clock until six o'clock the next morning, and can be delivered any time up till eight o'clock, while a day message has to be sent immediately and be delivered immediately.

Q. Well, take the matter of volume of business. That means you get a volume of business in the daytime to keep the wires busy and you don't have it at night, not enough to keep the wires busy?

A. I didn't say they kept the wires busy, but they have so much more business in the daytime it requires so much more help. That is my opinion simply.

Q. It would require more help in the daytime?

A. Yes; an operator's services.

Q. That is the main object of expense, is the hiring of help?

169 A. No, sir.

Q. That is the biggest item, isn't it, of expense?

A. Well, I don't know that it is.

Q. Do you know whether it is or not?

A. I do not.

Q. Now, take this night report which was furnished to the State Journal; you paid a man seventy dollars a month for taking that?

A. We did.

Q. And you know what the State Journal paid for it?

A. I do not.

Redirect examination.

Examined by Mr. ESTABROOK:

Q. The man who takes the night press report has in the neighborhood of forty-eight hundred to fifty-six hundred, and sometimes six or eight thousand, to take almost at a sitting, has he not?

A. Yes, sir.

Q. With a direct wire clear through to Chicago, with an expert at the other end sending as fast as he can?

A. Supposed to be sending as fast as he can.

170 Q. There are degrees of efficiency among operators as well as the rest of mankind?

A. Yes, sir.

Q. I will ask you if Mr. Syford, the gentleman who testified here as an expert this morning, is competent to take as it should be taken the night report?

A. I would say I don't think he was.

Q. What is the difference, then, between the qualifications of the operator who is to take the day report and the one who is to take the night report?

A. Well, the day report is never sent continuously. A man will take one or two or possibly three sheets at a time, and then he may have a let up for twenty minutes or half an hour, and is rested up, but the night report is sent as fast as it can, whereas the man who takes the night report sits down at six o'clock and doesn't have a let up until twelve, and it is sent faster and takes a better man.

Q. So the work of a man at night is more steady and continuous and wearisome than the man in the daytime?

A. Well, there is hardly any comparison. I can't make any comparison myself.

Recross-examination.

171 Examined by Mr. STEWART:

Q. Mr. Syford did take the night report for a great many years, didn't he?

A. No, sir.

Q. I mean before you came in there?

A. I don't know.

Q. If he did take it, it was pretty fair evidence that he was competent?

A. I don't know anything about Mr. Syford's ability outside of while he was working with me. I might state that eighteen or nineteen years ago the report wasn't sent as it is nowadays; it has advanced as everything else.

Q. Was you there then—eighteen or nineteen years ago?

A. I wasn't in Lincoln.

Q. Don't know how it was taken?

A. Not here, but I know in a general way it applies all over.

Q. What was you doing eighteen years ago?

A. In the same business I am now.

Q. Where at?

A. Nebraska City.

Q. Didn't get the press there at all, did you?

A. Yes, sir; for a while.

Q. The night report?

172 A. Yes, sir.

Q. What paper?

A. The Nebraska City Press.

Q. Eighteen years ago?

A. I wouldn't say just eighteen years ago. It was the old Chronicle.

Q. Well, when did you take it at Nebraska City?

A. I don't know just when it was. I have taken it there, but don't remember just exactly how long ago it was.

Q. When did you take it there?

A. I took it for one night only, just to see how they took it there, when the operator was sick.

Q. When was that?

A. In 1881, I think.

Witness excused.

173 H. D. ESTABROOK, being produced and duly sworn on behalf of defendant, testifies as follows:

Examined by himself:

Q. I wish simply to state that the letter-, copies of which I wish to introduce, as given in this record, were not returned to me by the stenographer, and he is living in Chicago, out of the jurisdiction

of this court, and I haven't these letters in my possession nor in the office, nor has the company.

By Mr. AMES: But they are the same letters that were introduced at the former trial?

A. Yes, sir.

AMES:

Q. And certified in the bill of exceptions?

A. Yes, sir; by the stenographer.

Cross-examination.

Examined by STEWART:

Q. Have you made any effort to get these letters from the
174 gentleman in Chicago?

A. No; I thought perhaps they were in my files, and I worked to locate them, but I found they weren't.

Mr. STEWART: The plaintiff objects as incompetent.

Overruled. Exception.

Witness excused.

175 C. B. HORTON, being produced and duly sworn on behalf of defendant, testifies as follows:

Examined by Mr. ESTABROOK:

Q. State your full name to the jury, Mr. Horton.

A. Charles B. Horton.

Q. What is your business?

A. Assistant superintendent of the Western Union Telegraph Company.

Q. How long have you held that position?

A. Between five and six years.

Q. What was your position with the company in 1887?

A. I was chief clerk in the superintendent's office at Omaha.

Q. Do you recall, Mr. Horton, the time in 1887 when the evening paper called the Democrat was started in Lincoln by Mr. Calhoun?

A. I don't remember the time it was started.

Q. Remember about the time?

A. No; I couldn't say that I do.

Q. You remember the fact that there was any negotiations with your company for the delivery of the afternoon press report?

A. Yes, sir.

Q. Calling your attention to letter, Exhibit "B," page 37, on records, marked for identification by this reporter as Exhibit B B, I will ask you if that is a copy of the original letter produced here
176 on the said trial, and which was received by your company in the due course of mail from Mr. Calhoun.

A. It is.

Mr. ESTABROOK: Defendant now offers in evidence Exhibit "B B," found on page 206 of this record.

"B B."

Mr. STEWART: The plaintiff objects to the introduction of the letter in evidence for the reason that the same is incompetent and immaterial and no foundation laid.

Overruled. Exception.

The above exhibit is here read to the jury by Mr. Estabrook.

Q. I will ask you to look at a copy of the letter marked in the record as Exhibit "C," page 37, and marked for identification by this reporter as Exhibit "C C," and ask you if that is a copy of the letter sent to Mr. Calhoun.

A. It is.

Mr. ESTABROOK: The defendant now offers Exhibit "C C" in evidence.

Mr. STEWART: The plaintiff objects as incompetent, irrelevant and immaterial, and no foundation laid.

177 Overruled. Exception.

"C C."

The above Exhibit "C C," which is found on page 207 of this record, is here read to the jury by Mr. Estabrook.

Q. I will ask you to look at a copy of a letter marked in the record as Exhibit "D," page 38, and marked for identification by this reporter as Exhibit "D D," and ask you if that is a copy of the letter received in evidence on the last trial, and being a copy of a letter sent by this company to Mr. Calhoun.

A. It is.

"D D."

Mr. ESTABROOK: The defendant now offers in evidence Exhibit "D D," found on page 208 of this record.

Mr. STEWART: The plaintiff objects as incompetent, irrelevant and immaterial, and no foundation laid.

Overruled. Exception.

The above Exhibit "D D" is here read to the jury by Mr. Estabrook.

Q. How long after this letter in June, Mr. Horton, was it
178 before Western Union commenced to serve the Democrat here with afternoon reports?

A. I can't state; I don't remember the exact time.

Q. You recall whether or not the terms as stated by the Western Union were accepted by the Democrat?

A. They were.

Q. And the report was served for how much?

A. Seventy-five dollars per month telegraph tolls.

Q. That continued during the life of the Democrat and Mr. Calhoun's connection with it, did it not?

A. Yes, sir.

Q. And also continued from that time until the commencement of this suit, in April, 1891?

A. Yes, sir.

Q. Then the report was delivered in pursuance of this contract made by virtue of this correspondence from some time in 1887 until some time in 1891?

Mr. STEWART: The plaintiff objects as calling for a conclusion of the witness.

Overruled. Exception.

A. It was.

Q. Mr. Horton, would the Western Union Telegraph Company have delivered the Northwestern Associated Press reports to the Democrat or to the Courier except on the terms proposed by
179 it and the Associated Press?

Mr. STEWART: The plaintiff *as* objects as calling for a conclusion of the witness, as speculative, as incompetent, irrelevant and immaterial, and something on which the witness has not shown himself to be competent to testify.

Sustained. Exception.

Q. What were the duties of the chief clerk in the superintendent's office?

A. He had charge of the entire office—of the correspondence and everything that went through it.

Q. Do you know, of your personal knowledge, of the consultations and actions taken by Superintendent Dickey and Superintendent Conrey in this matter?

A. I was informed by them.

Q. I will ask you if you know whether the Western Union Telegraph Company would have entered into this contract for the furnishing of this report on any other terms than those designated in the correspondence in evidence.

Mr. STEWART: The plaintiff objects as incompetent, irrelevant and immaterial, and no foundation laid, and asks leave of court to propound cross-interrogatories in reference to this matter at this time.

180 By Mr. STEWART:

Q. This consultation, you say, by Mr. Dicke*t* and Mr. Conrey was carried on by correspondence?

A. Yes, sir.

Q. And what you gathered you saw in telegrams and letters from Mr. Conrey?

A. Telegrams and letters; yes, sir.

Plaintiff insists on the above objection.

Overruled. Exception.

A. I was going to tell you that I handled the correspondence myself and figured the interest, and handled the matter and recom

mended the rate myself, dictated the letters myself, and recommended the rate to Col. Conrey.
Cloury.

Mr. ESTABROOK: I will ask you if they would have entered into this contract to supply this news and create these facilities on any other terms than seventy-five dollars a month.

Mr. STEWART: Who had authority to fix these rates?

A. Vice-President Clowery, of Chicago.

Mr. STEWART: The plaintiffs object- to testimony as to what Col. Clowery would have done.

Overruled. Exception.

181 A. They would have not furnished it on any less favorable terms to the telegraph company; they would have furnished it at no less rate.

Q. Who would not?

A. The telegraph company would not have furnished it at any less rate.

Q. In these letters as mentioned—Col. Dickey's letters—to the effect that it will involve the necessity of increasing our force and facilities between Omaha and Lincoln in order to handle it in time—is that a fact?

A. Yes, sir.

Q. What facilities were lacking?

A. We hadn't the wire facilities in the daytime.

Q. How many wires did you have in 1887 between Omaha and Lincoln?

A. I don't think we had but the one wire on the U. P. that we could use for Lincoln business. The B. & M. had their wires for business on their own road.

Q. Did it involve, then, the putting in of another wire?

A. It did.

Q. Did you do that?

A. We did.

Q. Before this news was sent to the Democrat?

A. Yes, sir.

Q. It also speaks of increasing the force. What was meant
182 by that, Mr. Horton?

A. It meant that we had to put on an additional man at Lincoln.

Q. An additional operator?

A. Yes, sir.

Q. Was that done?

A. Yes, sir.

Q. Was that ever done until the erection of this wire and the receiving of this report?

A. It was done after that wire was put up and that report started.

Q. To the Democrat?

A. Yes, sir.

Q. I will ask you, Mr. Horton, — the taking of that day report

necessities at any time or all times the employment of an extra man here in Lincoln?

A. Not the entire time of a man, but about half of his time.

Q. Supposing that report ceased?

A. We would drop the man here.

Q. Has there been a time since 1887, if it had ceased, you would have dropped a man?

A. I don't think so.

Q. What is the pay of a man to take that report?

A. I think it is sixty dollars. I would — be positive about that. They have been at different salaries.

Q. Can the Western Union Company afford to send the
183 Press Association reports to the different newspapers at a different rate per word than they can commercial messages?

A. Yes, sir.

Q. Why?

A. Because the work involved does not require so much time to handle the business. The press report is not the same kind of business that commercial messages are.

Q. From commercial messages the number of words is counted?

A. Yes, sir; by the receiving operator.

Q. Also by the receiving clerk when he takes tolls?

A. Yes, sir.

Q. And every little paper that goes through your office goes through the same process at both ends of the wire?

A. Yes, sir. The press report is filed and handed over to the operator.

Q. But the *rods* are not counted in that?

A. No, sir.

Q. Was that your contract in reference to it?

A. Yes, sir; just averaged them, I suppose. It is not counted at the receiving office.

Q. How much less can the Western Union afford to take press reports per word than commercial messages, if you know?

A. The conditions vary, of course.

Q. As a matter of fact, how much less do they; to the ex-
184 tent indicated in these contracts?

A. Yes, sir.

Q. Can the Western Union afford to transmit messages in the night-time cheaper than in the daytime?

A. Yes, sir.

Q. Why?

A. Because at night they have more wires. They have a great many wires at use in the daytime, and these wires are used for press business, and the volume of night business, commercially, is not so great as in the daytime.

Q. Would not the fact that the press report, which is a continuous sending and receiving, and without making any record of it or counting of words or making any record of it at all—wouldn't that enter into it?

Mr. STEWART: The plaintiff objects as leading.
Overruled. Exception.

A. Yes, sir; it would enter into it largely.

Q. I will ask you, Mr. Horton, whether or not seventy-five dollars a month for the delivery of the Associated Press report, afternoon report, to the Lincoln Call, from 1887 to 1891, for from fourteen to fifteen hundred words, was an excessive rate.

Mr. STEWART: The plaintiff objects as incompetent, irrel-
185 evant, and immaterial, the witness not having shown himself competent to testify on this subject.
Overruled. Exception.

A. It was not.

Q. Is there any other afternoon paper in the United States within a like distance from Chicago receiving that report, or did it receive that report during that time, for any less than seventy-five dollars a month over the Western Union wires, if you know?

Mr. STEWART: The plaintiff objects for the reason that the witness has not shown himself competent to testify on this subject.
Overruled. Exception.

A. Not to my knowledge.

Q. Well, what is your knowledge as to the rates furnished afternoon papers to such towns as Kansas City, St. Joe, Omaha, and the like of that, within practically the same radius of Chicago?

A. I only know as acting as agent for the Associated Press—collecting their charges. We don't collect our tolls from any papers in these towns, except as we are acting as agents for the Associated Press and collecting the charges for them.

Q. Is it the collecting of tolls?

186 A. No, sir; the collecting of tolls, and the association charges. It is the collection of the assessment of the association to the paper, as I understand it.

Mr. STEWART: You don't make any rates to the paper—the telegraph company?

A. No, sir; to the association.

Mr. ESTABROOK:

Q. From 1887 to 1891 what did you collect?

A. We collected then only at Lincoln, but we collected at the same time the association assessment at Omaha and Council Bluffs, and in these other towns.

Q. Were they being supplied cheaper in Omaha and Council Bluffs than here?

A. No, sir.

Mr. STEWART: This collection you made at Omaha was a lump sum, wasn't it?

A. Yes, sir.

ESTABROOK:

Q. Are your rates to the Press Association for this report to any

of the towns within a like radius of Chicago any less than you made by contract to the Lincoln Call?

Mr. STEWART: Is the provision in regard to rates to the Press Association provided by written contract?

187 A. Yes, sir.

By ESTABROOK:

Q. Is the contract here in evidence?

A. The contract shows the rate; yes, sir.

Q. I will ask you, then, to figure that out. Have you ever collected, Mr. Horton, the amount that these papers paid to the Associated Press or to the Western Union for their monthly report?

A. I have never.

Q. You give me the list of papers—I mean give me the list of charges made to other papers.

A. The rates for telegraph tolls—I have a list of the charges made to other papers, the list of telegraph tolls; I fixed them myself.

Q. What towns do these include?

A. Well, there is one at Durango, Colorado.

Q. What others?

A. There was at that time one at Albuquerque, New Mexico; El Paso, Texas; Colorado Springs, Colorado——

Q. Well, do you know what rates they were paying the Western Union for this afternoon report?

A. I do.

Q. I will ask you what they were.

Mr. STEWART: The plaintiff objects as incompetent, irrel-
188 evant, and immaterial, because the witness has not shown himself competent to testify on this subject.

Q. I will ask you, Mr. Horton, if the convenience for transmission and delivery of reports there were any different than they are here.

A. I don't think they were any more favorable than here.

Q. Were they less favorable than here?

A. The report was transmitted from Denver, and in some cases was less favorable; tolls were greater; but we had a greater amount of wire.

Q. Then I will ask you what these rates were.

Mr. STEWART: The plaintiff objects as incompetent, irrelevant, and immaterial.

Mr. STEWART: Was it as large a circuit as here—take in as many points?

A. The day circuit at that time, I think, took in more points—no, probably about the same. Every once in a while a city would drop out.

The plaintiff insists on the above objection. Overruled. Exception.

189 By the COURT: Did these reports come from Chicago?

A. Sent from Chicago to Denver and there re-edited and practically a new report made of them. El Paso was the farthest point served from Denver. They paid us sixty dollars a week for the day and night report. Albuquerque paid us thirty dollars. Colorado Springs paid us twenty dollars a week. That was the nearest point to Denver. That has been discontinued since, and there was a number of towns in Kansas took the same, like report. Kansas City got practically the same report, and our telegraph tolls there I can't remember just now, but none was less than seventy-five dollars, charged to the association, and some was eighty-five dollars, and ninety-six dollars at Emporia and I think at Wellington, Salina, and Atchison. We served them all, I think.

Q. Where from?

A. From Kansas City.

Q. I will ask you again what, if any, was the difference in the facilities for supplying the towns you have mentioned over the Colorado district and the towns from Kansas City and Lincoln here.

A. At what time?

Q. From 1887 to 1891.

A. Well, we never attempted to start the service, and would not make any figures until we had the facilities to start it and handle it properly; so the facilities had to be complete wherever we delivered the report. That is one reason why we didn't send it

190 here when Calhoun first wanted it.

Q. Was there any difference in the cost to the company between supplying these points from Denver and Kansas City and this report at Lincoln?

A. Practically none. There might have been a little difference in the western circuit—might have been a little more there.

Q. Since this suit arose between the old Call and the Western Union Telegraph Company, I will ask you if the direct contract between the new Call Publishing Company and the Western Union has been abrogated.

A. There has been a change; yes, sir.

Q. To whom now does the Western Union look for its pay?

A. To the Northwestern Associated Press.

Q. Do you know what the present Call Company has to pay the Associated Press for the same services these gentlemen were getting?

A. Yes, sir.

Q. How much was it?

A. One hundred and eighty dollars a month; that includes everything.

Mr. STEWART: The plaintiff moves to strike out the answer as immaterial.

Motion withdrawn.

191 A. It amounts to that. Twenty-five dollars a week amounts to about 108.00 a month.

Q. It is the same afternoon report—under the same franchise that Mr. Bushnell and Mr. Cox had with the old concern?

STEWART: The plaintiff objects as leading.

Q. It is the same report that they were receiving?
A. It is the same report; yes, sir.
Q. That is, from the same association?
A. Same association and report; yes, sir. Well, I don't know, either. I beg your pardon; I think it is the Associated Press now.
Q. Successors to this other?
A. No. I guess the Associated throws them all out, practically absorbs them.
Q. You say it is the same number of words?
A. Practically; yes, sir.

Cross-examination.

Examined by Mr. STEWART:

192 Q. That $108.00 is the assessment that the Associated Press makes?
A. Yes, sir.
Q. To cover the telegraph tolls and its own charges?
A. That is the way I understand it.
Q. Now, were you in the Western Union Company's office as early as 1884?
A. In the employ of the company?
Q. Yes, sir.
A. I was.
Q. Where at?
A. Omaha.
Q. What was your position?
A. Clerk and stenographer in the superintendent's office.
Q. Was the day report at that time sent to the State Journal?
A. I think it was.
Q. And how was it sent—what facilities were used at that time?
A. Well, we had one wire that carried all the commercial business from the east through Omaha to Lincoln, and that was sandwiched in between the commercial business.
Q. And it continued to be sent the same way until when?
A. Until the Democrat began to take the afternoon report.
Q. That is, the same facilities were used, and it was sent in the same manner in 1885 and 1886 as in 1884?
A. Yes, sir.
193 Q. And you claim that when the Democrat began taking it you had to put on additional force and additional facilities?
A. Yes, sir; we did at that time.
Q. Well, in what way do you mean it took any different facilities after they began to take this day report than it did before when you was furnishing it to the Journal?
A. The Journal didn't have any use for the day report.

Q. But what different facilities were necessary to furnish it than it was before?

A. We had to have it so it could be handled on that wire continuously, without being interfered with by commercial business, to get it out in time for their use.

Q. What effect would the commercial business have on this day report?

A. Delay the remitting of it so we wouldn't get it out in time.

Q. Then if this report—day report—would have *have* been put through so as to get "30" here by three o'clock or earlier, the commercial business would have no effect on it then, would it?

A. If we could get it through at that time, but it was practically an impossibility.

Q. If that day report was got through here prior to the time the Democrat began taking it in 1887, so they got it out by three o'clock or after, that would be as good as the way you done it afterwards, would it?

194 A. Yes, sir.

Q. And if, as a matter of fact, you were able to get it out by three o'clock before the Democrat began taking it, then you had facilities to put it through before that time as well as after that, didn't you?

A. You are supposing a case that didn't exist. If that was a fact, we would have had ample facilities to connect when they first wanted it, without putting on an additional wire.

Q. If that had been a fact, you would have been to no additional expense in the way of additional facilities?

A. Why, certainly not; but that fact didn't exist.

Q. When did you put the next wire in, after you put the one in in 1887?

A. I don't remember.

Q. Did you put any in after that, between Omaha and Lincoln?

A. Yes, sir; several.

Q. What made it necessary to put these in?

A. Increase in business.

Q. That is commercial business?

A. Yes; and a demand for wires.

Q. Have you put in any additional men since 1887?

A. Yes, sir.

Q. What made it necessary?

A. Same reason that required additional facilities—increase in business.

195 Q. How much of the time of an operator did it take to receive this day report for the Journal before the Democrat began taking it?

A. Well, the time of an operator in taking the report probably took an hour and a half; possible more and possibly less. A man could handle that very easy in an hour and a half if it was sent continuously.

Q. And after that you think it took more?

A. Yes; he had to be there.

Q. Provided he didn't put on any of his time at other work?

A. Yes, sir.

Q. And if he did put in his time at other work after that the Democrat began taking it it, would take about four hours, you think?

A. Yes, sir.

Q. You don't know of your own knowledge how much of the time of the operator who received the day report put in at other work during those hours the report came, do you?

A. No, sir; I do not.

Q. I believe you testified on the former trial of this case that when they had a let up of considerable time on the report—day report—that they would always use the operators for commercial business if crowded; that is the fact, is it not?

A. What period?

Q. From 1887 on.

196 A. I might have said so; I don't know.

Q. They could just as well as not, if they had a let up, couldn't they?

A. Why, certainly.

Q. From 1887 to 1891, the commercial business grew very rapidly; didn't it in Lincoln increase very rapidly?

A. Yes; I think it did all over the country; I couldn't give the exact years.

Q. Do you know when this report began to be sent through direct from Chicago?

A. No; I don't know exactly.

Q. Was it along in 1889 or 1890?

A. I know we put up a quadruplex from the first wire of the Missouri Pacific, and used it for the Associated Press for some time. It was relayed at Omaha, and then we tied it on a circuit to save expense. Often we had to cut it off on account of some mere little trouble, or something like that.

Q. That would save expense to send it directly from Chicago, would it?

A. Save the time of one man at Omaha.

Q. Save two men at Omaha, wouldn't it?

A. No; one man.

Q. When was this wire put up on the Missouri Pacific?

A. I think in June or May; May or June, 1887.

197 Q. At the time that the Missouri Pacific was built in here?

A. No, sir; not until afterwards.

Q. You remember how long afterwards?

A. No; I don't know; it was put up about September or November, I think. As soon as it was up we used it. Our records will show when it was put up.

Q. Did you begin sending it over that wire—the day report—just as soon as you put it up, if you remember?

A. I think it was sent over the new wire as soon as it was put up and equipped.

Q. Do you know about that?

A. I couldn't testify for certain. It might have been a few days or weeks or a month or the first day it was put up. I couldn't say for sure. It was put up practically for that purpose and exclusively for this day report.

Q. That would be too much like the case of the tail wagging the dog, to suppose that, wouldn't it?

A. Yes, sir.

Q. You had been sending it over the U. P. wire before that time?

A. Yes, sir; sent it over the joint wire of the U. P.

Q. And you say you didn't use the B. & M. wire running along the B. & M. road?

A. Not for Lincoln business; the B. & M. have got their own wires. We have no interest in them.

Q. Don't you have any wires along that road?

198 A. No; only what was called the A. & M. in Nebraska, not between here and Omaha.

Q. You used them?

A. Yes; for local business on their lines.

Q. What was the volume of night business as compared with the day business?

A. I never looked into it very closely, but I should say it ran about one-third as much as the day business.

Q. What is the volume of the commercial business as compared with the other business done by the company?

A. What other business do you mean, do you mean the Associated Press?

Q. What do you have besides the commercial business?

A. We have market reports, newspaper specials, and Associated Press reports and leased wires.

Q. Well, now, excluding the newspaper specials, what is the volume of the commercial business as compared with the balance?

A. Well, the balance does not cut much figure as compared with the commercial business; leaving out leased wires, commercial business largely exceeds all the others.

Q. Now, this Democrat report you spoke of; do you know what the amount of this report was?

A. About the same as the report here.

Q. The day report here?

A. Yes, sir.

199 Q. And how about the night report there?

A. I don't think it was as heavy.

Q. What points did you say that was taken at?

A. Albuquerque, New Mexico; El Paso, Texas; Durango, Colorado; Colorado Springs, Colorado. It has been taken at a great many other places, but discontinued. One time, I remember, it was sent to Grand Junction. I don't know whether it was the day or night report.

Q. I am asking about the day report. When was it that these reports were taken at these points?

A. During 1887 and 1888, I think.

Q. Those are the only places you remember of?
A. The only ones I remember the rates.
Q. Well, what other points took the report?
A. I think Pueblo took it. I think it was taken at Pueblo.
Q. You are positive about that?
A. Yes, sir.
Q. Was that all or was there others?
A. I don't think of any others.
Q. And this rate that you say they paid, who was that paid to?
A. To the telegraph company part of the time.
Q. And how much of it did they pay over to the Press Association or whoever receives it?
A. We simply collect our own tolls.
Q. In what way did you become acquainted with the
200 fact of the amount that was collected as tolls at these points?
A. It was reported by the officers in their monthly accounts.
Q. Do you know whether this report was delivered to more than one paper or not of these points?
A. I don't know.
Q. Now, what points were on the circuit here upon which the Call received this report?
A. Lincoln was one.
Q. What other places?
A. She was the only one at the time it was relayed at Omaha.
Q. Well, after that?
A. I couldn't tell you exactly, as I told you before; probably Des Moines was on-, and Council Bluffs, and Omaha, and Sioux City, and Lincoln.
Q. When was that?
A. I think that was in 1887.
Q. How long did that continue?
A. Or 1888; I am not sure. I couldn't tell you, because I didn't have the handling of that. That is hearsay with me.
Q. What points were on the night circuit, if you remember?
A. I would have to give you hearsay evidence on that, because the district east of the Missouri river was in a different district, and I am not acquainted with it.
Q. Any more on that circuit than on the Colorado circuit?
201 A. On the night circuit; yes, sir; not on the day circuit. Sometimes we would have to divide the Colorado circuit.
Q. That covered a great deal of territory—that Colorado circuit—didn't it?
A. Yes, sir; a great deal of mileage and more wire.
Q. This twenty dollars a week you spoke of as collecting at Colorado Springs, you know whether that was all they had to pay for their services—for the telegraph service?
A. I wouldn't say. I think it was.
Q. You know whether that covered the fees of the Associated Press?
A. No; only the telegraph service.

Q. You don't know of another case, do you, Mr. Horton, where the telegraph company was already furnishing its day report to one paper and then began furnishing it to another paper in the same city, what rate they fixed under such circumstances?

A. Not the day service; no, sir; except the case at Omaha, and that covered both the day and night report.

Redirect examination.

Examined by Mr. ESTABROOK:

202 Q. Their contract there gives the Bee an extra copy of this report for $100.00; what services does that include?

A. It includes the making of an additional copy of the day and night report at the same writing.

Q. Done at the same writing?

A. Yes, sir.

Q. On this tissue paper, with the carbons between?

A. Yes, sir.

Q. Manifolding?

A. Yes, sir.

Q. And for simply furnishing that extra copy of this report the Western Union received $100.00 from the Associated Press?

A. Yes, sir; that is the contract.

Q. What they get from the Bee for it you don't know?

A. No, sir.

Q. Do you know how much the Bee paid bonus or royalty for the purpose of being permitted to take this report?

STEWART: The plaintiff objects as incompetent, immaterial, and irrelevant.

Sustained. Exception.

Q. Do you know, Mr. Horton, what that $125.00 covered which the Journal was paying to the Western Union, what report and how many words, if you know?

A. I know.

203 Q. What was the number of words and what report?

A. The night report and forty-eight hundred words.

Q. All that the $125.00 was paid for was the night report of 4,800 words?

A. That is not positive; no, sir. I wouldn't say it, as I don't know. I got that from my superior.

Q. By what arrangement was the evening report transmitted to the Journal prior to 1887, if you know?

STEWART: The plaintiff objects as incompetent.

Sustained. Exception.

Q. Do you know, Mr. Horton, under whose orders or at whose direction the evening report was sent to the Journal prior to 1887?

A. Do I know who ordered it?

Q. Yes, sir.

A. Yes, sir.

Q. Who was it?

A. Well, who gave us the order, you mean?
Q. Yes, sir.
A. The Associated Press.
Q. Do you know how much the Associated Press paid the Western Union for that service?
A. I do not. I would like to qualify my answer as to
204 that, if you will allow me.
Q. Very well.
A. We can't start to serve any paper without orders from the Associated Press; that has been impressed on us very strongly.

Recross-examination.

Examined by Mr. STEWART:

Q. You know whether the Western Union got any compensation for the order or not?
A. I do not.
Q. If they had, you probably would have known it?
A. The arrangement was entered into outside of our office; it didn't go through our office at all.
Q. That is the arrangement for the pay?
A. Yes, sir.
Q. And you don't know when that arrangement for the $125.00 was entered into?
A. No, sir.
Q. And you don't know what that covers?
A. Only from hearsay.
Q. In regard to the arrangement the present Call has with the Associated Press, you know that?
205 A. We are instructed from the association to deliver the report to them and collect $25.00.
Q. And that is remitted to the association?
A. Yes, sir.
Q. And that is an entirely different institution from this old Northwestern Association?
A. Yes, sir.

Witness excused.

206 ROBERT A. HUTCHINSON, being produced and duly sworn on behalf of the defendant, testifies as follows:

Examined by Mr. ESTABROOK:

Q. Please state your full name.
A. Robert A. Hutchinson.
Q. What is your business?
A. Local manager of the Western Union here.
Q. How long have you been manager here at Lincoln?
A. Since the middle of July, 1895.
Q. Since you have been here in that position the office has been receiving the afternoon report of the Press Association for the Lincoln Call, has it?

A. Yes, sir; almost all the time.

Q. Consisting of how many words?

A. At least about forty thousand words a month; about fifteen hundred a day, I suppose.

Q. What hour is it, during your incumbency, has it been received?

A. It generally starts in a little after eleven in the morning and closes between three and four; sometimes as late as four in the afternoon.

Q. State whether or not it requires the attention of an operator to attend to that during those hours.

A. Yes, sir; we have an operator specially for that work.

207 Q. If that work should drop out or cease, would it enable you to drop out of employment an operator?

A. Yes, sir; it would immediately dispense with one operator.

Q. State to the jury and court why a report that would take only an hour and a half, if sent directly, requires that time.

STEWART: The plaintiff objects for the reason that it is shown that the report is much larger than formerly.

Overruled. Exception.

A. I think it would take a little more than an hour and a half to take that report. The reason why we employ a man that many hours is because the Press don't furnish it to us continuously; sometimes wait a little while; they don't file it all at times; that file it as they can get it, and we have to have a man there to watch business, while the man taking that at night has to be working all the time.

Q. So that the work itself is not very hard, of taking that report?

A. Well, it takes a good operator.

Q. And when he is not busy taking that report, then he is employed in the general duties of the office?

A. Yes, sir.

208 Q. But if it were not for that you could dispense with the work of this man, dispense with the services of one man?

A. Yes, sir.

Q. I will ask you if that has proved to be the case within a recent time?

A. Yes, sir. The time we take that report is the busiest time in the day.

Q. I will ask you, Mr. Hutchinson, to look up your log book and ascertain the day at which the Call report was dropped.

A. It was dropped on the 14th of June last.

Q. That was, then, under Mr. Bushnell and Mr. Cox?

A. No, sir; the new management had it then, Mr. Austin.

Q. For how long a time was it dropped?

A. Dropped until the 27th of that month.

Q. I will ask you to look up and find if a man was dropped. Did you do that?

A. Yes, sir; dropped one man.

Q. On what day?

A. The same week, about three or four days afterwards. I expected him to resume again right away. Mr. Austin said he wanted to look into the matter, so we didn't drop him for four or five days.

Q. Mr. Syford was taking the dispatch then, was he?

A. Yes, sir.

209 Q. At what salary?

A. Sixty dollars a month. We didn't drop him out of our employment at that time. We dropped the youngest man in the office and gave Mr. Syford his place.

Q. Did you lower his salary?

A. Yes, sir; and he took the position of fifty dollar- a month.

Q. When was that report resumed?

A. On the 27th of June.

Q. I will ask you if you employed a man.

A. Yes, sir; put one on at sixty dollars a month.

Q. When?

A. The same day.

Q. Have you more recently been notified by the Call that, owing to dull times, they proposed to drop this report?

STEWART: The plaintiff objects as incompetent, irrelevant, and immaterial.

Overruled. Exception.

A. On the 17th of December the manager of the Call notified us that during the bad times he would have to drop it.

STEWART: The plaintiff objects as hearsay.

Overruled. Exception.

210 Q. What day of December was it?

A. The 17th of December; and I immediately notified our superintendent and also my chief operator to drop a man—that sixty-dollar position.

Q. Did the Call discontinue?

A. No, sir; it changed its mind.

Cross-examination.

Examined by Mr. STEWART:

Q. Did you drop anybody this last time?

A. No, sir.

Q. Who was the party you dropped the first time?

A. Mr. Cutter, the youngest man in the office.

Q. Is the business of the office increasing or decreasing now?

A. It runs along about the same all the time. It isn't as heavy as we have in good times.

Q. That is, since the hard times have come on it is run down?

A. It is not a- good as it was last year when the legislature was here.

Q. They were all dead-heads, wasn't they?

A. No; not exactly.

211 Q. Now, you say while this day report was coming if there was a let up, you would put the man to work at something else there in the office?

A. Yes, if we could in that immediate vicinity.

Q. Now, he would get to work on another class of business or on some other work?

A. Yes, but he would be called right back as soon as the report started in.

Q. So it would actually take of his time away from your work there about how much?

A. I couldn't tell you exactly.

Q. Well, I suppose it depends somewhat on how you are crowded on other business?

A. Yes, sir; but I didn't include the report work.

Q. Would you say it took that operator as much as an hour or an hour an-a half away from his work?

A. No, sir.

Q. Well, the rest of the time while the report was coming, or after the report was there, you used him at other work?

A. Yes, sir.

Q. How many hours constitute a day's work?

A. Why, they go on at eight in the morning and quit at six in the evening, and have an hour for dinner—nine hours.

212 Q. Well, you wouldn't have to turn a man off if you had had work for him there through this hour, if you had had work for him?

A. Not if we would have had work.

Q. You aim to keep a man busy, don't you?

A. That is my instructions; yes, sir.

Q. Well, you manage to do it, don't you?

A. Yes, sir; we have a force and just handle it properly and satisfactorily.

Q. So if you had work for these fellows that took the day report at either time when he was taking that report, you would still keep him?

A. We would have to have a good deal more work than we have now to keep him. There would have to be a very large increase in some other directions that we don't look for.

Q. Did it take very much of a shrinking of your general business to enable you to drop one man that is now taking the press report, and have some fellow that is working at something else take it?

A. No; we can't do that.

Q. Suppose one *one* of your regular operators—you couldn't keep him quite busy, you could put him at taking the press report, couldn't you?

A. No, sir; as I said before, it takes a good operator.

Q. You have got good operators, haven't you?

A. Yes, sir; but, as I said, we have so many wires there, and one man has to look after quite a number of wires, and I can't
213 take one of these men off to handle the press reports, for it needs a man specially for that purpose.

Q. There is no trouble to get a man to take the press report, is there?

A. No; no trouble; we haven't tried lately; the men we have now have been there for years; I presume we could have a man easily enough.

Q. Did you have any trouble to fill the place when Syford quit?

A. No, sir.

Q. How many men have you now in the daytime?

A. I have five, including the chief operator.

Q. Well, now, if you had work to keep these men all busy for nine hours, the mere fact that the Call would quit taking this press report would enable you to drop one man, would it?

A. Yes, sir; the way business is now.

Q. But not the way business is now; the mere fact that the Call would quit taking this press report would enable you to drop one man, wouldn't it?

A. Yes, sir; it would.

Q. If you had business at this time sufficient to keep your five men all busy the nine hours of the day, the mere fact that the Call ceased to take this day report would enable *to* to dispose entirely with the help of one man nine hours?

214 A. Why, we always aim to keep enough men there to do the work.

Q. Just answer the question.

A. As I said before, the business that we now do, unless we have an increase in the business, we would drop a man.

Q. But supposing they were all busy?

A. We would keep enough men to handle the business.

Q. So that if you have work for a man for nine hours the fact that two or three hours of his work is dispo-sed with would enable you to let him out entirely?

A. In that case we put on an extra man and pay him for so many hours a day.

Q. Or else put him on a split trick?

A. If we had a split trick we might.

Q. The fact of the business is, you say, if the Call quit taking the report you could simply dispense with a man two or three hours. I mean if your men were busy?

A. If our men were busy I would put on an extra man and pay him for so many hours a day.

Q. You are liable to let a man go almost any time, whether the Call quits or not, aren't you?

A. I can't; no, because they are decreased as low as possible.

Q. But if business decreased further you might let out another?

A. Yes; we might let out another.

Witness excused.

215 AMES: The defendant offers now to read the testimony of H. D. Hathaway as it is in the bill of exceptions in the former trial of this case.

STEWART: The plaintiff objects as incompetent, immaterial, and irrelevant, and for the further reason that no foundation has been laid.

216 JOHN H. AMES, being produced and duly sworn on behalf of defendant, testifies as follows:

Examined by himself:

Q. I am acquainted with Mr. Hathaway, who was formerly business manager of the State Journal, whose testimony is now offered. He now resides in Denver. I understand he is still there. I am told so by Mr. Bushnell, who is employed in the State Journal.

Cross-examination:

Examined by STEWART:

Q. Did you say Mr. Bushnell is now in the employ of the State Journal?

A. I so understand it. Mr. Hathaway's attendance cannot be procured at this term of court.

Witness excused.

217 AMES: The defendant now offers in evidence the testimony of H. D. Hathaway, as taken at the former trial of this case and as reported in the bill of exceptions in this case.

STEWART: The plaintiff objects as incompetent, immaterial and irrelevant, and as no foundation being laid.

Overruled. Exception.

The testimony of said H. D. Hathaway is here read to the jury by Mr. Ames and is as follows:

218 H. D. HATHAWAY, called on behalf of the defendant, sworn, questioned by Mr. Estabrook, testifies as follows:

Q. What is your business?

A. I am manager of the State Journal Company.

Q. And have been how long?

A. Nearly twenty years; since the company was organized as a company.

Q. You own one or two press franchises, do you not?

A. Yes, sir.

Q. What ones are they?

A. I own the franchise of the—what is called the morning-paper franchise of the Associated Press and both morning and afternoon of the United Press.

Q. How many words do you receive altogether from the United Press?

A. Why, I could not tell other than this: We receive from—it runs perhaps from eleven to fifteen thousand, all told, from both associations.

Q. Now of this eleven to fifteen thousand all told, what per cent., about, comes from the United Press?

A. Well, we receive—I could state that, perhaps, on a method a little different. It runs from five, perhaps, to—five thousand comes from the Associated Press and the remainder from the United Press. The majority of it comes from the United Press—
219 more than half of it.

Q. More than half of it comes from the Associated Press?

A. The United Press.

Q. Your United Press is received over what wire?

A. It is over what is called the Postal telegraph, I believe.

Q. Your Associated Press is received over what wire?

A. Over the Western Union wire.

Q. Have you any contract with the Western Union Company for the delivery of the afternoon report?

A. We have not.

Q. You don't own, then, a franchise for the afternoon report?

A. No.

Q. Have you been in the habit of receiving it?

A. We have been in the habit of receiving it after the afternoon papers were out, in connection with our night-before report.

Q. Well, prior to the starting of this paper, were you in the habit of receiving it?

A. Prior to the starting of the afternoon paper?

Q. Prior to the starting of the Lincoln Democrat, for instance?

A. Yes, sir.

Q. Under what arrangement or circumstances—you say they were not obligated—did you pay for it?

A. No, sir; except as we paid—it might be included in the whole arrangement. To make it clear, as I understand it, it
220 is this: It is frequently the case that the night report refers to something in the day report. We utilize the day report simply in making a connecting thing of the night report; we did not utilize it in full, and don't now; sometimes we use quite a little of it, and sometimes we use none of it. My understanding was it was simply sent to us to connect those broken places.

Q. Your contract with the Associated Press is for the morning report, and it — in writing, I suppose?

A. Well, yes; that is, our franchise carries with it the contract.

Q. Have you recently investigated the tariffs and costs of receiving such reports over other lines than the Western Union?

A. Yes, sir; I have—that is, over one other line. While receiving the United Press report I have over the Postal telegraph.

Q. As I understand it, you own the afternoon franchise of that association?

A. Yes, sir.

Q. What are their rates for their report over the Postal telegraph for the afternoon?

A. They ask me three hundred dollars a month.

Q. For how many words?

A. Not to exceed three thousand.

Q. How much on an average?

221 A. Well, it is simply worded in that manner, "not to exceed 3,000 words," and gives no average. The average, of course, will fall below that.

Q. Now, you do, as I understand, receive over the Postal wires the night report of that association?

A. Yes, sir.

Q. How many words are in that report? As you say, over half of the fifteen thousand?

A. Yes, sir; that is, it varies; perhaps as low as ten sometimes, the daily report, and sometimes as high as fifteen.

Q. How much do you pay the Postal Company for that report?

Objected to as incompetent, immaterial, and irrelevant. Sustained, and defendant excepts.

Q. What are night rates for the delivery between Chicago and Lincoln of the United Press matter?

A. We pay them two hundred dollars a month.

Q. You have already testified as to the number of words in that?

A. Yes, sir.

Q. What did you say as to the number of thousands, about?

A. I think the average we receive from the United Press would probably be not far from 7,500 to 8,000 words. I would not like to say positively on that, but that is my impression.

222 Q. And the other, how much?

A. Well, the other would run from probably 4,500 to 60,000; somewhere along there. While we may sometimes get a little over, I think our limit is supposed to be 5,500 or 5,600.

Q. Do you know the reason of this difference in the night rate and the day rate? Did you investigate that?

A. I did; yes, sir.

Q. What are the reasons?

Objected to as incompetent, irrelevant, and immaterial, the witness not having shown himself competent to give an opinion, and calling for the conclusion of the witness.

(The COURT:) He has shown himself qualified to give an opinion, but the reasons that somebody else has given him he is not qualified to state. If he knows of any facts he can give them.

By Mr. STEWART:

Q. You are not in the telegraph business, are you?

A. No, sir; I could only state the reasons as I investigated them with the view of establishing a business of my own.

By Mr. ESTABROOK:

Q. Why is it that the night rates of the Postal Company are less than the day rate and so much less?

223 Objected to as incompetent, irrelevant, and immaterial, the witness not having shown himself qualified to give an opinion, and calling for the conclusion of the witness. Sustained, and defendant excepts.

Q. Why is — worth less to transmit messages and press reports at night than during the day?

Objected to as incompetent, irrelevant, and immaterial, the witness not having shown himself qualified to give an opinion, and calling for a conclusion of the witness. Overruled. Exception.

A. For the reason that in the daytime the wires are almost entirely occupied or largely occupied by commercial business. At night they are relieved, and that it requires the same amount of service to collect the news, transmit, and receive it in the daytime that it does at night, with a great deal less number of papers taking it as news, which *pro rata* is worth more to them. Those are the main reasons, as I understand them, of the difference.

Q. You were investigating this subject with the view of starting an evening paper here, were you?

A. I was; yes, sir.

224 Q. How long ago?

A. During the past year.

Cross-examination.

Examined by Mr. STEWART:

Q. Mr. Hathaway, in speaking of expense of collecting news you don't refer to that as increasing the cost to the telegraph company of transmitting so many words?

A. Not necessarily; no, sir.

Q. Do you know whether the Western Union send the night report of the Associated Press over one wire alone to this point?

A. I think only one wire at a time.

Q. I mean do they use a wire which they send the night report over exclusively for the Associated Press dispatches?

A. I could hardly answer that.

Q. Do you know?

A. Yes, in this manner: Of course, the wire is exclusively for that use, both for day and for night reports, during the particular time when they are sending that report; but during the intervening space, when they are all sent, it is my understanding they are permitted to use the wire during that intervening space. When

225 the press reporter calls for the wire he is entitled to it, regardless of other business.

Q. Is the same true of the afternoon report?

A. Yes, sir; that is my understanding.

Q. You don't know of any person in this city having paid to the Postal Telegraph Company the sum of $300.00 per month for the afternoon dispatches, not exceeding 3,000 words?

A. No, sir; I know of no one who has paid it.

By Mr. ESTABROOK:

Q. You are the only one that own the franchise?

A. Yes, sir.

By Mr. STEWART:

Q. You don't take it?

A. No, sir; it is too expensive. I can't afford it.

Q. You don't know whether they have any facilities for furnishing afternoon reports or not, do you?

A. I think they have. I was informed by them that they have. I have no personal knowledge of it.

Q. In addition to this $125.00 that you pay the Western Union for their services, you also pay $20.00 to the Associated Press?

A. Yes, sir.

Q. Your contract prior to the starting of the afternoon daily in this city permitted you to receive the afternoon dispatches to
226 be utilized by you as far as you cared to use them?

A. To utilize them in connection with our morning report; not for an afternoon publication.

Q. So far as you wanted to use them?

A. Well, it was by a kind of common consent. There was no agreement; it was simply, as I said before, for the purpose of completing some news that might appear the night before.

Q. You could use all that you wanted to; I presume you got them all?

A. Yes; I think we got them all.

Redirect examination.

Examined by Mr. ESTABROOK:

Q. You was the pioneer in the newspaper business here, were you not—I mean in this country?

A. Pretty near so; yes, sir.

Q. Do you claim any consideration on that account?

Counsel for plaintiff objects to what the witness claims on that account. Sustained.

Witness excused.

227 Defendant wishes to offer in evidence a portion of the testimony of the witness Cox, found in the bill of exceptions of the testimony taken at the former trial of this case, which is offered by the defendant here as an admission, Cox being an officer of the company.

The defendant offers the first question and answer of Mr. Cox, where he states his connection with the plaintiff.

The plaintiff objects as incompetent, irrelevant and immaterial, and no foundation laid.

Overruled. Exception.

The above question and answer thereto *is* as follows:

"Q. What is your relation to the plaintiff, The Call Publishing Company?

A. I am one of the stockholders and directors, business manager, and one of the editors."

The defendant also offers in evidence the following questions and answers thereto in the testimony of the witness S. D. Cox, found on page 7 of the former bill of exceptions of this case:

228 The plaintiff objects as incompetent, irrelevant and immaterial, and no foundation laid. Overruled. Exception.

The above questions and answers referred to are as follows:

"Q. The Call, as well as the Democrat, is an evening paper, isn't it?

A. Yes, sir.

Q. Gotten out what time in the day?

A. We go to press generally about four o'clock; we also publish a paper which is issued Sunday morning.

Q. What time do you commence getting in the news of this association?

A. I don't know exactly — it begins to come in; I think a little before noon ordinarily.

Q. Then from some time in the forenoon until a little after three o'clock?

A. That is about the time.

Q. It is important and necessary that it should be gotten within those hours, isn't it?

A. It is of no use to us unless it is about in those hours."

229 The defendant also offers in evidence the certificate of the then Postmaster General of the United States, under the act of Congress establishing the Western Union telegraph lines as postal agencies, a copy of said certificate being found on page 58 of the former bill of exceptions of this case. No objection on the part of plaintiff.

Said certificate is here read to the jury, a copy of which is identified as Exhibit "E E" and found on page 209 of this bill of exceptions.

230 *Rebuttal.*

H. M. BUSHNELL, recalled on behalf of the plaintiff in rebuttal, testifies as follows:

Examined by Mr. STEWART:

Q. Mr. Bushnell, you were present and heard the testimony of Mr. Carlton on the trial of this case with reference to the matter which was sent after the Democrat and Call began taking it?

A. Yes, sir.

Q. I will ask you to state the fact as to the manner in which that report was sent, commencing the same from July, 1888, through the years 1888 and 1889, in regard to its being given the right of way and coming regularly.

ESTABROOK: The defendant objects unless he calls the witness's attention to what portion of Mr. Carlton's testimony they wish to rebut.

Overruled. Exception.

A. Why, the fact in regard to the way in which the dispatches after the first of June, 1888, when we took the office—they were sent the same as before that—by being relayed at Omaha, and often they were sidetracked for other business.

231 Q. At Omaha?

A. Yes, sir.

Q. How do you know that?

A. I know that because the manager of the office here, Mr. Mahony, at the time told me.

ESTABROOK: The defendant objects to the answer as hearsay and asks to have it stricken out.

Sustained. Exception.

Q. What was the fact about its coming regularly?

A. It came irregularly up for a year and a half; up to that Lincoln was connected with the regular circuit, and the relay stopped at Omaha; it came irregularly, and we made complaint, and I went to Omaha once in reference to the matter, and sent to the Western Union office in Omaha——

ESTABROOK: The defendant objects as not responsive to the question.

Q. State what you learned at Omaha in regard to the trouble and the cause of it.

A. I went to Omaha for——

ESTABROOK: The defendant objects as incompetent, irrelevant, and immaterial.

Overruled. Exception.

232 A. I went to the Western Union office at Omaha——

By the COURT: The witness will understand that I am not giving you leave to tell what other people told you.

Q. Go ahead and state what you saw and done.

A. I went to Omaha and telephoned to our office here, and asked if the report was coming, and they said it wasn't coming any better.

ESTABROOK: The defendant objects as not responsive to the question.

Sustained. Exception.

Q. Now, what did you do?

A. I went to the Western Union office in Omaha and asked them——

ESTABROOK: The defendant objects as not responsive to the question.

Q. When you was there, did you see the man who receives or transmits this day report?

A. I did.

Q. Did you see what he was doing?

A. I did.

233 Q. Now, what was he doing? Tell the jury.

ESTABROOK: The defendant objects to the question without bringing it down to an operator.

Overruled. Exception.

A. I saw the report there, accumulated there at the operator's desk.

Q. How long did you notice that?

A. I noticed that until the operator commenced sending it in.

Q. How much of an accumulation did he have?

ESTABROOK: The defendant objects as incompetent, irrelevant and immaterial, and not covered by an issue in this case.

Overruled. Exception.

A. He must have had ten or fifteen pages at the time, of manuscript.

Q. Did you notice what was the fact as to whether that was sent out promptly to Lincoln?

ESTABROOK: The defendant objects as incompetent, irrelevant and immaterial, and not covered by the issues in this case.

A. It was started promptly after I saw it there that day.

234 Q. There after they got an accumulation?

A. It was accumulated, and then I saw it there.

Q. For what length of time was it that the matter was accumulated, if you know?

ESTABROOK: The defendant objects as incompetent, irrelevant and immaterial, and not covered by the issues in this case, and for the additional reason that an action of this kind does not by any means establish a custom of which they were in the habit of doing.

Overruled. Exception.

A. This individual matter at that time?

Q. Yes, sir.

A. Why, I couldn't say what length of time it had been accumulating.

Q. Don't you know how long it had been accumulated?

A. No; it was two o'clock in the day when I was there and saw it.

Q. What proportion of the report was that?

A. About one-third.

Q. Had it been transmitted that day, up to that time, to Lincoln?

A. I think so; yes, sir.

Q. About one-third, you say, along there, on the desk?

235 A. Yes, sir.

Q. Did the manner of sending this report change at any time?

ESTABROOK: The defendant objects as incompetent, irrelevant and immaterial, and not covered by the issues in this case, and for the additional reason that an action of this kind does not by any

means establish a custom—of what they were in the habit of doing.

Overruled. Exception.

A. It changed, I think, about a year and a half after we commenced getting the report, in July, 1888.

Q. Did you ever make any complaint to the company of the manner in which this report was sent?

ESTABROOK: The defendant objects as incompetent, irrelevant and immaterial, and not covered by the issues in this case, and for the additional reason that an action of this kind does not by any means establish a custom—of what they were in the habit of doing.

Overruled. Exception.

A. Very often.

Q. In what manner was the report sent, you say, after the change was made?

236 ESTABROOK: The defendant objects as incompetent, irrelevant and immaterial, not covered by the issues in this case, and for the additional reason that an action of this kind does not by any means establish a custom—that they were in the habit of doing.

Overruled. Exception.

A. I can't answer that, only by what the manager told me.

Q. You know about it being relayed?

ESTABROOK: The defendant objects as incompetent, irrelevant and immaterial, not covered by the issues in this case, and for the additional reason that an action of this kind does not by any means establish a custom—of which they were in the habit of doing.

A. When it was changed from being relayed at Omaha, the manager he said that it would hereafter—that this office was to be on the regular circuit, and that there would be no relaying at Omaha.

Q. And this, you say, was about the beginning of the year 1890?

A. I think in the fall of 1889. I can't locate exactly the time.

Q. Now, this irregularity which you speak of in the coming
237 of the report prior to this change, did that get the report in here so that "30" came in at its usual time; what is the fact about that?

ESTABROOK: The defendant objects as incompetent, irrelevant and immaterial, and not covered by the issues in this case, and for the additional reason that an action of this kind does not establish a custom of what they were in the habit of doing.

Overruled. Exception.

A. The matter under the relay system was delayed, so that often we lost part of the service—not get it in time to get it in the paper by four o'clock.

Q. Well, would it get here by four o'clock usually?

ESTABROOK: The defendant objects as incompetent, irrelevant and immaterial, and no- covered by the issues in this case, and for the additional reason that an action of this kind does not by any means establish a custom—of what they were in the habit of doing.

Overruled. Exception.

A. I couldn't say as just to the time it would get here.

ESTABROOK: The defendant asks that the entire testimony
238 of this witness be stricken out of the record as incompetent and not as proper rebuttal.

Overruled. Exception.

Cross-examination.

Examined by Mr. ESTABROOK:

Q. They had in 1887 put up a second wire between Omaha and Lincoln, had they not, Mr. Bushnell?

A. I only know from hearsay.

Q. They had in 1887 employed an additional operator in Lincoln, had they not?

A. I have no knowledge of the fact.

Q. How many operators did they have in 1887?

A. I don't know.

Q. In 1888 how many did they have in Lincoln?

A. I don't know.

Q. Didn't you get onto the way the operator was doing in Lincoln the way you did in Omaha?

A. No, sir.

Q. Notwithstanding they may have had two wires instead of one and a foreman and two operators instead of one, the transmission of the Associated dispatches between Omaha and Lincoln in
239 the daytime was not as rapid and did not come as promptly as you would like?

A The service certainly didn't come as promptly as we would like.

Q. Was this "30" that you speak about transmitted as a part of the Associated Press dispatches, or how?

A. Well, I am inclined to think it was transmitted simply because "30" at the close of the last dispatch was always on the manuscript we got. I think it started from the operator in Chicago. I think Chicago put the "30" on in the first place.

Witness excused.

Plaintiff rests.

Defendant rests.

240 *Copy of Exhibit "A."*

(Copy of Exhibit "A A.")

Associated Press Rules.

EXHIBIT "A," pg. 1. Victor Seymour, Reporter.

1. All assessments must be paid when due and upon demand.

2. Each person, company, or corporation, receiving Associated Press reports, is authorized to publish the same in one newspaper only, and in one language only. Those publishing morning editions only shall not be allowed to publish the afternoon reports in a separate edition, nor shall those publishing even- editions only be allowed to receive and publish the night report in a separate edition.

3. Local or special news shall be placed at the service of the Associated Press for general use only.

4. No person, company, or corporation, receiving the news dispatches of the Associated Press, shall furnish the same in advance of publication to any person who is not connected with the Associated Press; nor furnish local or special news to any newspaper or combination of newspapers not having business relations with the Associated Press; nor in any manner contribute to the building up of competing news organizations or newspapers.

241 *Associated Press Certificate.*

Exhibit "A," pg. 2. Victor Seymour, reporter.

I hereby certify that, the Daily State Democrat, and afternoon daily newspaper of the city of Lincoln, State of Nebraska, having paid its consideration therefor, and having accepted the conditions of the rules of the Western Associated Press (which rules are appended to this certificate) has been granted the right to print the news dispatches supplied by the Associated Press in said city, and is entitled to the enjoyment of the same as long as it shall faithfully comply with the rules of the Western Associated Press now in force, or which may be hereafter adopted for the regulation of the service of business of said association; pays upon presentation the weekly or monthly assessments levied for the use of the dispatches, and files promptly within the hours of publication for the benefit of the Associated Press, the news of a general character originating within its district,—the said Western Associated Press agreeing in return for the faithful performance of the above conditions not to grant the same privileges to any new evening paper in said city without the consent of the said Daily State Democrat, in whose name the certificate was issued.

242 General office of the Associated Press, May 30th, 1884.

WM. HENRY SMITH,
General Manager.

(Marked Ex. A A.)

Exhibit "A," pg. 3. Victor Seymour, reporter.

Copy of Exhibit A, Being the Endorsement on Back of Exhibit "A A."

JULY 10, 1888.

For a full consideration this franchise is sold, conveyed, & transferred to the Call Publishing Co.

J. D. CALHOUN,
Pub. State Democrat.

(Marked Ex. A.)

243 EXHIBIT "B," pg. 1. Victor Seymour, Reporter.

Copy of Exhibit "B."

Memorandum of agreement, made an- entered into this first (1st)
(81)
day of June, A. D. 1891, by and between the Western Union Telegraph Company and the Northwestern Associated Press, hereinafter respectively designated as the telegraph company and the Associated Press, witnesseth:

That for and in consideration of the covenants and agreements herein contained the parties hereto have mutually agreed as follows:

First. The telegraph company agrees to transmit from the city of Chicago for said Associated Press daily (except Sunday) when its lines are in working order, a day news report of twelve hundred (1,200) words and a night report of forty-eight hundred (4,800) words to the following places, to wit: Burlington, Iowa, Council Bluffs, Iowa, Davenport, Iowa, Dubuque, Iowa, Des Moines, Iowa, Keokuk, Iowa, Omaha, Nebraska, Peoria, Illinois, Quincy, Illinois, Rock Island, Illinois, Springfield, Illinois, Sioux City, Iowa.

Second. The Associated Press agrees to pay to the treasurer of the telegraph company for the above-named service eighteen thousand six hundred and thirty-six dollars ($18,636.00) per year in equal installments of fifteen hundred and fifty-three dollars ($1,553.00) at the close of each month from and after the first
244 (1st) day of June, A. D. 1881.

If an average of more than six thousand (6,000) words per week day be transmitted, the excess shall be paid for at the rate of one and one-fifth (1⅕) cents per word. The average to be ascertained monthly, and to be based on the number of week days in each month.

Third. And said Associated Press agrees that during the continuance of this agreement they and their agents, and all parties furnished by them with news for publication, and the agents of such parties, shall employ the said telegraph company exclusively to transmit to and from all places reached by its lines, all telegraphic messages relating to the news or newspaper business. And said Associated Press agrees that they and their agents and employees, and all parties furnished by them with news for publication and

their agents and employees will not at any time sell or in any way dispose of for private use or otherwise any commercial news or market reports or quotations or use the same in any manner except for publication in their newspapers.

Fourth. And the telegraph company agrees that it will not sell or be interest- in selling for private use within the territory of said Associated Press any news, excepting election returns, and strictly commercial news or market reports and quotations, and that it will require any parties with whom it may make an

Exhibit "B," pg. 2. Victor Seymour, reporter.

245 arrangement for the transmission of such election returns, commercial reports, and market quotations to confine such reports and quotations within said territory strictly to their private business and not to be used for any newspaper publication.

And the telegraph company agrees not to transmit news to or for any rival news association in the territory of the Northwestern Associated Press on more favorable terms than are herein agreed upon; and the telegraph company will not without the consent of the Associated Press, deliver any of said association's news reports to any other place than the places above named within the territory of said Associated Press, which comprises all of the States of Illinois, (excepting the city of Chicago) Iowa, and Nebraska.

Fifth. And said Associated Press agree that they will not at any time impose any restriction on their members or [illegible] other party to whom they furnish news for publication in regar[illegible] obtaining special news reports by Western Union lines, and, that each shall be at liberty to procure any such special reports by said lines free from any interference or control of said Associated Press.

Should said telegraph company at any time elect to furnish news reports of the Associated Press to places in Illinois, Iowa, and Nebraska, not included in the above list of places,

Exhibit "B," pg. 3. Victor Seymour, reporter.

246 the telegraph company in consultation with the executive committee of the Associated Press will fix the rate of compensation for such reports; but said Press Association shall be entitled to fifteen per cent. of the amount collected; and in no case shall a contract so made be for less term than one year nor at a price less than a proportionate rate to that charge- for similar service to members of the Associated Press at competing points.

And it is also understood and agreed that the news reports herein referred to shall be filed in the telegraph company's Chicago main office for transmission without any expense to the telegraph company in procuring the use of the same.

Sixth. This agreement shall be and continue in force one (1) year from the first (1st) day of June, A. D., 1881, and thereafter until terminated by one (1) year's written notice of either party to the other.

In witness whereof the parties hereto have hereunto set their hands and seals the day of the year first above written.

THE WESTERN UNION TELEGRAPH COMPANY,
By JNO. VAN HORNE, *Vice-President.*
[SEAL.] By A. R. BREWER, *Secretary.*

Exhibit " B," pg. 4. Victor Seymour, reporter.

247 J. S. CLARKSON,
J. W. CHAPMAN,
JOS. BOWALL,
H. W. CLENDENIN,
D. N. RICHARDSON,
Executive Committee, North Western Associated Press.

The telegraph company agrees to transmit every week day from the city of Chicago to the places named in the first clause of the foregoing contract, two hundred (200) words additional day report, and eight hundred (800) words additional night report, an increase of one thousand (1,000) words per day altogether, for which the Associated Press agrees to pay to the telegraph company the sum of ten dollars ($10.00) per day at the close of each month in addition to the payment hereinbefore provided for.

The increased service and compensation therefor to commence on June 10th, 1882.

Witness our hands and seals this sixth (6th) day of October, 1882.

THE WESTERN UNION TELEGRAPH COMPANY,
By JNO. VAN HORNE, *V. P.*

Exhibit " B," pg. 5. Victor Seymour, reporter.

248 [SEAL.] By A. R. BREWER, *Sec'y.*

THE NORTH WESTERN ASSOCIATED PRESS,
By J. S. CLARKSON, *Pres't.*

H. W. CLENDENIN, *Sec'y.*

Exhibit " B," pg. 6. Victor Seymour, reporter.

249 It is further agreed between the Western Union Telegraph Company and the North Western Associated Press as follows:

1. The telegraph company agrees to transmit from points embraced in the foregoing agree*ing* dated the first (1st) day of June, 1881, to the North Western Associated Press at Chicago, day and night news reports gathered by said Associated Press, and filed with the telegraph company at said points, to be so transmitted.

2. In consideration whereof the North Western Associated Press agrees to pay to the telegraph company monthly one-half (½) of a

cent per word for news reports, that is those sent between six a. m. and six p. m., and one-fourth (¼) of a cent per word for night news reports, that is, those sent between six p. m. and six a. m.

This supplemental agreement shall take effect as of the first (1st) day of November, 1885, and shall continue in force during the continuance of said agreement of June 1st, 1881.

In witness whereof the parties hereto have hereunto set their hands and seals this fifteenth day of December, 1886.

THE WESTERN UNION TELEGRAPH COMPANY,
By JNO. VAN HORNE, *Vice-President.*
[SEAL.] By A. R. BREWER, *Secretary.*

Exhibit "B," pg. 7. Victor Seymour, reporter.

250 THE NORTH WESTERN ASSOCIATED PRESS,
By —— ——, *President.*

—— ——, *Secretary.*

In consideration of the delivery by the telegraph company of the reports hereinbefore provided for to one additional newspaper at Omaha, viz: the Omaha "Bee" which the telegraph company hereby agrees to do, the Associated Press hereby agrees to pay to the telegraph company from and after the first day of October, 1883, during the continuance of the foregoing agreement, the sum of one hundred dollars ($100.00) per month at the close of each month in addition to the payments hereinbefore provided for.

Witness our hands and seals this fifth day of July, 1884.

THE WESTERN UNION TELEGRAPH COMPANY,
By JNO. VAN HORNE, *Vice-President.*

[SEAL.] A. R. BREWER, *Secretary.*

Exhibit "B," pg. 8. Victor Seymour, reporter.

251 THE NORTH WESTERN ASSOCIATED PRESS,
By C. E. YOST, *President.*

A. STONE, *Secretary.*

Exhibit "B," pg. 9. Victor Seymour, reporter.

252 *Copy of Exhibit "B B."*

Office of Daily State Democrat; J. D. Calhoun, editor and publisher.

LINCOLN, NEBRASKA, *May* 5, 1887.

J. J. Dicke*t*, Esqr., supt. W. U. Tel. Co., Omaha, Neb.

DEAR SIR: Yours of the 3rd received. Mr. Wm. Henry Smith, of the Associated Press, informs me that I must make arrangements

with you for cost of transmission of the report, & as soon as I have done so he will give me a rate for the news. I trust you will take the matter into full and liberal consideration, &c.

Yours, &c., J. D. CALHOUN.

Exhibit "B B." Victor Seymour, reporter.

253 Copy.

Copy of Exhibit "C C."

Western Union Telegraph Company, superintendent's office; J. J. Dickey, supt.

OMAHA, NEBR., *May 21st*, 1887.

J. D. Calhoun, Esq., State Democrat, Lincoln, Nebr.

DEAR SIR: The matter of rate service of the afternoon press report is still in Col. Clowry's hands, and I am in correspondence with him about it.

It will involve the necessity of increasing our forces and facilities between Omaha and Lincoln in order to handle it in time for your use.

I will advise you as soon as possible as to what rate we can give, and will make it as low as possible.

Very respectfully,

(Signed) J. J. DICKEY, *Supt.*

D. Dict. A.

Exhibit "C C." Victor Seymour, reporter.

254 Copy.

Copy of Exhibit "D D."

Form No. 164.

Executive office, New York; Western Union Telegraph Company, superintendent's office; Norvin Green, president; A. R. Brewer, secretary.

OMAHA, NEB., *June 6th*, 1887.

Dail- State Democrat, Lincoln, Neb.

GENTS: I am authorized to name a rate of seventy-five dollars ($75.00) per month W. U. tolls for the Northwestern Association's 1,400-word report to Lincoln.

You will have to arrange with the association for the use of the report, and have them give the order through Vice-President Clowry, Chicago, when we commence serving it.

We expect to have our facilities in shape to serve this promptly in a few days.

Very respectfully,

(Signed) J. J. DICKEY, *Supt.*

H. Dict.

Exhibit "D D." Victor Seymour, reporter.

255 *Copy of Defendant's Exhibit "E E."*

POST-OFFICE DEPARTMENT,
WASHINGTON, D. C., *November 2nd*, 1891.

I, John Wanamaker, Postmaster General of the United States of America, certify that the annexed is a true copy of the original acceptance on file in this department.

In testimony whereof I have hereunto set my hand and caused the seal of the Post-office Department to be affixed, at the city of Washington, the day and year above written.

JNO. WANAMAKER,
Postmaster General.

[Seal of Post-office Department, United States of America.]

Western Union Telegraph Company.

Meeting of the board of directors at the executive office, 145 Broadway.

NEW YORK, *June* 5, 1867.

Resolved, That this company does hereby accept the provisions of the act of Congress entitled "An act to aid in

Exhibit "E E," page 1. Victor Seymour, reporter.

256 the construction of telegraph lines, and to secure to the Government the use of the same for postal, military, and other purposes," approved July 24, 1866, with all the powers, privileges, restrictions and obligations conferred and required thereby; that the secretary be and is hereby authorized and directed to file this resolution with the Postmaster General of the United States, duly attested by the signature of the acting president of the company and the seal of the corporation, in compliance with the fourth section of said act of Congress.

Adopted unanimously.

HIRAM SIBLEY,
Acting President of Western Union Telegraph Company.

[Seal Western Union Telegraph Co.]

O. H. PALMER,
Secretary W. U. Tel. Co.

Endorsement: 9. Western Union. Filed June 8, 1867. Jos. H. Blackfan, chief clerk.

Exhibit "E E," page 2. Victor Seymour, reporter.

257 In the District Court of Lancaster County, Nebraska.

THE CALL PUBLISHING COMPANY, Plaintiff,
vs.
THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

And the defendant in the above-entitled cause, in the district court of Lancaster county, third judicial district of Nebraska, hav-

ing within the time heretofore allowed by the court for that purpose reduced to writing in their bill of exceptions all the testimony adduced or offered on both sides of *and* before-named cause in the before-named court, all of the objections, with the grounds therefor, made to the admission of testimony, all of the rulings of the court on such objections, and all of the exceptions to such rulings made and taken at the time, and having served the same on the attorneys for the above-named plaintiff according to law, for examination and amendment, and the same being *being* now here before me, the undersigned judge, before whom said cause was tried, on the motion of the attorneys for the defendant that the same may be settled, allowed, signed, sealed, and made a part of the record in the said cause in the said court:

Now I, the said judge, do hereby certify that this bill of exceptions contains all the testimony adduced or offered by the
258 plaintiff and defendant on the trial of said cause, all of the objections to the admission of testimony, all the rulings of the court on such objections, and all of the exceptions taken to such rulings at the time, and I do hereby order that it be made a part of the record in the said cause in the said court, the plaintiff waiving notice of time of presenting of said bill to the court for allowance.

Done at Lincoln, Nebraska, this 7 day of May, 1896.

ALBERT J. CORNISH,
Judge of the District Court.

Clerk's office, district court.

Filed May 8, 1896.

SAM. E. LOW,
Clerk District Court.

I, Sam. E. Low, clerk of the district court of Lancaster county, in the third judicial district of Nebraska, do hereby certify that this is the original bill of exceptions filed in the office of said clerk in said cause.

In testimony thereof I hereunto set my hand and affix the official seal of said court this 8th day of May, 1896.

SAM. E. LOW,
Clerk of the District Court,
[SEAL.] By ED. R. SIZER, *Deputy.*

I hereby certify that this transcript contains all of the evidence adduced or offered on the hearing of the above cause at the February, 1896, term of the district court of Lancaster county, Nebraska.

VICTOR SEYMOUR,
Official Reporter.

Reporter's fees, $33.35.
P'd by def't's att'ys.

259 7882. Z, 31. Call Publishing Co. *vs.* Western Union Tel. Co. Bill exceptions. $33.35. E/A. Clerk's office, district court. Filed May 8, 1896. Sam. E. Low, clerk district court.

Endorsed: 8610. Western Union Tel. Co. *v.* Call Pub. Co. Bill of exceptions. Supreme court of Nebraska. Filed Jul- 2, 1896. D. A. Campbell, clerk.

And afterward, to wit, on the 27th day of July, 1896, there was issued from the office of the clerk of said court a certain summons in words and figures following, to wit:

Summons in Error.

THE STATE OF NEBRASKA, *ss:*

To the sheriff of the county of Lancaster:

You are hereby commanded to notify the Call Publishing Company that a petition in error has been filed in the supreme court of Nebraska by the Western Union Telegraph Company asking the reversal of a judgment against it rendered February 14, 1896, in a certain cause in the district court of Lancaster county, wherein The Call Publishing Company was plaintiff and The Western Union Telegraph Company was defendant, and to appear before the supreme court, at the city of Lincoln, on the 15th day of September, 1896, then and there to do and receive what the said supreme court shall order in the premises.

You will make due return of this summons on or before the 15th day of September, 1896.

260 Witness my hand and the seal of said court, at the city of Lincoln, this 27th day of July, A. D. 1896.

[SEAL.] D. A. CAMPBELL, *Clerk.*

General No., 8610. Supreme court, State of Nebraska. The Western Union Telegraph Company *v.* The Call Publishing Company. Summons in error.

And afterward, to wit, on the 3rd day of August, 1896, said summons was returned and filed in the office of the clerk of said court, endorsed as follows, to wit:

Received Jul- 27, 1896. John J. Trompen, Sheriff.

STATE OF NEBRASKA, } *ss:*
Lancaster County, }

I hereby certify that on the 28th day of July, 1896, I served the within writ of summons on the within-named The Call Publishing Company by delivering in person to William Leese, its attorney of record, a true and certified copy of the same, with all endorsements thereon, as required by law.

JOHN J. TROMPEN, *Sheriff,*
By TOM DRAPER, *Deputy.*

Fees.

Service and return	$ .50
Copy	.25
Mileage	.10
Total	.85c.

Supreme court of Nebraska. Filed Aug. 3, 1896. D. A. Campbell, clerk.

261 And afterward, to wit, on the 1st day of February, 1899, there was filed in the office of the clerk of said court a certain affidavit in words and figures following, to wit:

In the Supreme Court of Nebraska.

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,
vs.
THE CALL PUBLISHING COMPANY, Defendant in Error.

STATE OF NEBRASKA, *Lancaster County,* } *ss.*

John M. Stewart, being first duly sworn, upon his oath says that he is attorney for defendant in error in the above action, and that as such attorney, in the month of July, 1898, he prepared and had printed a brief on behalf of defendant in error, in accordance with the rules of said court, and then served the same upon Messrs. Ames and Pettis, attorneys for plaintiff in error, by delivering to them two copies of such brief; that said Ames and Pettis acknowledged the receipt of such brief in writing upon the back of one, and made no objection as to the time of such service. Affiant says that through some mistake or accident, for which he cannot now account, said briefs prepared by him and the acknowledgment of service of said Ames and Pettis were not filed in the office of the clerk
261½ of said court, and said acknowledgment of service has been lost or mislaid. Affiant says that he first learned that said acknowledgment of service of briefs and said briefs were not filed with the said clerk on this 31st day of January, 1899.

Affiant has ever since the date of such service had the impression that said briefs were on file, and cannot now account for the fact that they are not.

JOHN M. STEWART.

Subscribed in my presence and sworn to before me this 31st day of January, A. D. 1899.

THOS. DARNALL,
[SEAL.] *Notary Public.*

Endorsed: 8610. Western Union *v.* Call Pub. Co. Affidavit. Supreme court of Nebraska. Filed Feb. 1, 1899. D. A. Campbell, clerk.

And afterward, to wit, on the 2nd day of February, 1899, there was filed in the office of the clerk of said court a certain stipulation in words and figures following, to wit:

262 In the Supreme Court of Nebraska.

WESTERN UNION TELEGRAPH CO., Plaintiff in Error,
vs.
THE CALL PUBLISHING CO., Defendant in Error.

We hereby consent that defendant in error may file his briefs in the above case as of the date of service.

JOHN H. AMES,
Att'y for Plaintiff in Error.

Endorsed: 8610. Western Union Tel. Co. *v.* Call Pub. Co. Stipulation. Supreme court of Nebraska. Filed Feb. 2, 1899. D. A. Campbell, clerk.

And afterward, to wit, on the 8th day of March, 1899, there was rendered by said court and entered of record a certain judgment in words and figures following, to wit:

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,
v.
THE CALL PUBLISHING COMPANY, Defendant in Error.
No. 8610. Error from the District Court of Lancaster County. Judgment of Affirmance.

This cause came on to be heard, was taken up, and argued by counsel; on consideration whereof the court finds there — no
263 error apparent on the record in the proceedings and judgment of the district court. It is therefore considered by the court that said judgment be, and the same hereby is, affirmed; that the defendant in error recover of the plaintiff in error its costs, taxed at $—, and that a mandate issue accordingly.

And on the same day, to wit, the 8th day of March, 1899, there was filed in the office of the clerk of said court a certain opinion in words and figures following, to wit:

264 WESTERN UNION TEL. CO.
v.
THE CALL PUBLISHING CO.
No. 8610.

Opinion. Filed March 8, 1899.

1. The circumstances under which the contract by which the telegraph company agreed to transmit to the other party to the contract the news reports of the Associated Press examined, and held not to show the contract to be elemental of the consideration of the agreement by the Associated Press to furnish the news reports to the party to the first-mentioned contract other than the telegraph company.

2. A public-service corporation is amenable to the rules of the common law relative to discrimination in rates between patrons for like intrastate or interstate services rendered under like conditions, the latter in the absence of congressional legislation on the subject, and courts will enforce the rules of general jurisprudence in such matters.
3. The evidence in regard to the difference in night and day rates for several certain classes of services held to furnish a basis for ascertainment of the measure of the difference in night and day rates in the services involved in litigation, in the absence of evidence to show reason for a greater distinction.

265 HARRISON, *C. J.*:

In this action a recovery was sought of damages alleged to have accrued to the defendant in error by reason of unjust discrimination against it and in favor of another patron of the plaintiff in error in the rates charged for contemporaneous services.

There was a trial of the issues joined in the district court, and the plaintiff was awarded a judgment. In an error proceeding in this court the judgment was reversed and the cause remanded.

A second trial in the district court resulted in a judgment for defendant in error, and the cause has been again removed to this court by the telegraph company.

The opinion rendered at the former hearing is reported in the 44 Neb., page 326, and contains an extended statement of the facts, to which we now refer the reader. We deem it unnecessary to again set them forth herein. As developed during the second trial, they were in the main similar to what appeared during the first. Wherein they were dissimilar or different, or such new facts as were shown at the second hearing, we will to the extent necessary state them in the connection in which they may be material.

The defendant in error, hereinafter designated the Call Co., purchased of the "Daily State Democrat" and there was assigned to the former an "Associated Press certificate," by which it became entitled to receive daily and print certain press or news dispatches which were to be transmitted to it from Chicago by the plaintiff in error, hereinafter styled the telegraph company.

When the Call Company purchased the certificate of the Democrat it immediately opened negotiations with the Associated Press relative to the dispatches and the contract for furnishing and reception of them. It appears that, as the contracts were usually made, the Associated Press agreed to furnish the dispatches for a certain stated sum, which was inclusive of the charges of the telegraph company for transmission; that the former collected the whole amount and settled with the latter.

266 The Associated Press demanded, however, that the Call Company make its own contract with the telegraph company, which was done.

It is now claimed that as this was demanded by the Associated Press that a compliance with such demand was an essential of the

contract between it and the Call Company, and it became and was a part of the consideration for such contract.

To this we cannot agree. It is plainly disclosed that the Associated Press did not desire to become bound for the payment of the charges of the telegraph company for dispatches sent to the Call Company, and that this moved the demand to which we have referred; that the transaction amounted to no more than a sale of the dispatches to the Call Company, and it providing the means of transmission by its own contract, and that it should do so was not elemental of the consideration between it and the Associated Press.

It is argued that the petition did not state a cause of action. The reasons given for this contention are that the pleading attacked declared upon a contract for interstate business; that the regulation of such business rests exclusively with Congress; that the statutes of Nebraska by which it was sought to establish rules on the subject were ineffective; that there was no regulative national law applicable and no rules of the common law in force or recognized as national rules or enforceable within the nation as an entirety, or within the States composing it or any one thereof, which in the absence of statutory enactment by Congress might be invoked and be governable.

In the case of Gatton *v.* Chicago, R. I. & P. R. Co., 63 N. W. Rep. (Ia.), 589, the subject of the existence in the United States of the common law as national law was discussed, and it was decided in the negative.

In the opinion in the case of Swift *v.* Philadelphia R. R. Co., reported in 58 Federal Reporter, 858, it was said that "Congress has not adopted the common law of England as a national municipal law. The courts of the United States have many occasions to enforce the common law, but in every instance it has been as the municipal law of the State by which the subject-matter was affected."

267 The decision was to the effect that the common law was not in force as a national rule, and the exaction of unreasonable charges by a common carrier was a matter to be regulated by national law, and in the absence of any such law the common law as in force in a State could not prevail.

In the opinion in the case of Murray *v.* Chicago N. W. R. Co., reported in 62 Fed. Rep., 24, the matter was fully considered, and it was decided that the courts of the United States would recognize and enforce, in the absence of congressional legislation, the rules of general jurisprudence in any case and define the duties and obligations of the parties thereunder.

In Chicago, M. & St. P. R. Co. *v.* Solan, 169 U. S., 133, the proposition that there was in full force a law of general jurisprudence, and that it might be applied in a State court or in a Federal court was given full recognition. See also on this subject the 6 Am. & Eng. Ency. of Law (2nd ed.), pages 285 & 286.

We are satisfied from a review of the subject that in actions of the nature of the present, in the absence of national legislation, the

principles of the common law or general jurisprudence of the State of the action are applicable and may be asserted and enforced, and in this State the common-law right of action is accorded full force and scope. Chicago, R. I. & P. R. Co. *v.* Witty, 32 Neb., 275; Atchison, T. & S. F. R. Co. *v.* Lawler, 40 Neb., 356; Missouri P. R. Co. *v.* Tietken, 49 Neb., 130; Chicago, B. & Q. R. Co. *v.* Gardiner, 51 Neb., 70; St. Joseph & G. I. R. Co. *v.* Palmer, 38 Neb., 463; Union P. R. Co. *v.* Vincent, filed Feb. 23, 1899.

It follows that this argument is without avail.

In the former decision it was determined that—

"Where it is shown that a difference in rates exists, but that there is also a substantial difference in conditions affecting the difficulty or expense of performing the service, no cause of action arises without evidence to show that the difference in rates is disproportionate to the difference in conditions. A jury cannot be permitted to find such disproportion without evidence."

268 One of the questions presented at this time is, If it be conceded that a difference in conditions under which the services were rendered was shown, was there evidence produced during the second trial which would uphold a conclusion by the jury that the difference in the rates charged was disproportionate to the difference in conditions?

With reference to the change in facilities for transmission of messages which was, in part at least, made necessary to handle the increased business properly, it must be said that after the change in the facilities was made, patrons to whom the same matters were furnished must have them at uniform rates; but there was herein still the one difference in the conditions that one patron must be furnished the services at a specific or fixed time in each instance, while to the other the time was immaterial, or to the one it must be in the daytime and to the other not, and in this case it was shown practically to have been services for one in the day and to the other at night.

During the second trial there was shown that the difference between day and night rates for what are known as commercial and ordinary messages was that the night rates was two-thirds of the day rate; that it had been one half, but this produced so much night business of this nature that the night rate was increased.

It was also shown that on special news dispatches to certain newspapers, one directly involved herein and the other incidentally, the difference between day and night rates to each was one-half.

It was further of evidence that on services rendered the Press Association in transmission of news from various parts of the United States to Chicago, when being gathered for its patrons, the difference between the day and night rate was one-half. Of one of these at least there was no evidence during the first trial, and of another there was no discussion in the briefs; hence no notice in the opinion.

269 To the extent disclosed by the record, the reasons for the relative charges for day and night dispatches were the same, or were not materially dissimilar in the several classes of services.

There was, then, here tangible information from which the jury was warranted or might within proper rules draw the inference that as to the class of services directly involved in this controversy a like difference should prevail, or at least there were no grounds for a greater distinction than was shown in the classes as to which there was evidence on the subject.

Within this view the verdict of the jury was not wrong and must be allowed to stand. The judgment must be affirmed.

270 And afterward, to wit, on the 3rd day of April, 1899, there was filed in the office of the clerk of said court a certain motion for rehearing in words and figures following, to wit:

In the Supreme Court of Nebraska.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,
v.
CALL PUBLISHING COMPANY, Defendant in Error.

Motion by Plaintiff in Error for Rehearing.

Comes now the plaintiff in error and asks for a rehearing in the above-entitled cause:

1. For that, conceding that the common law of England is the common law of the United States, the court has erred in its statement of that law, for the common law of England after the time of the formation of the Federal Government permitted a common carrier to discriminate in rates, provided the rates charged to the party complaining were reasonable in themselves.

2. That neither in plaintiff's petition nor in the evidence is there any complaint on the part of the defendant in error that the rates charged it by plaintiff in error were unreasonable or extortionate.

3. For that the jury found that the service rendered by plaintiff in error to defendant in error was of a different class from the service rendered the Lincoln State Journal, justifying a greater
271 charge, and, having so found, it is beyond the province of court or jury to proportion such charges, and that the requirements of the law, common or statutory, are subserved (1) if the rates are reasonable in themselves; (2) if like rates are charged all persons for like service.

4. For that the court erred in making the number of words contained in a message or report the criterion to regulate the charge of plaintiff in error, whereas the testimony, properly understood, shows that the number of words transmitted is of slight significance.

5. For that the testimony shows that the Lincoln State Journal was entitled under its contract with the Press Association and plaintiff in error to receive not more than 4,800 words each night in consideration of $125.00 per month, which was a trifle more than one-half the rate per word charged defendant in error.

6. For that under the pleadings in this case plaintiff in error was called upon simply to meet the issue that its charges to defendant in

error were for the same, like, and contemporaneous service rendered the Lincoln Journal; and it having been establish- by the verdict of the jury in this case that the charges to defendant in error were not for the same, like, and contemporaneous service rendered the Lincoln Journal, the telegraph company was entitled to a judgment.

7. For that the payments made by the defendant in error to the plaintiff in error under the contract of its predecessor were without duress on the part of plaintiff in error and without protest on
272 the part of defendant in error and were therefore voluntary.

8. For that there is not, nor in the nature of things can there be, a common law of the United States; that the common law of a State can have no greater sanction than the statute of the State, and that neither can regulate, save only within well-defined police powers, interstate commerce.

9. For that the correspondence introduced in evidence between the agents of the Associated Press, on the one hand, and the predecessor of the Lincoln Call, on the other, shows beyond peradventure that the entering into a contract with the plaintiff in error for its services was a condition precedent to the furnishing of the press report; that the latter would not have been furnished except for the former, and that therefore it was elemental as a consideration for the report that the Western Union be paid the amount contracted for, and that the payments under such contract were, as aforesaid, voluntary.

JOHN H. AMES,
HENRY D. ESTABROOK,
Att'ys for Pl'ff in Error.

Endorsed: General No., 8610. In the supreme court of Nebraska. Western Union Telegraph Company, plaintiff in error, *vs.* Call Publishing Company, defendant in error. Motion for rehearing. Supreme court of Nebraska. Filed Apr. 13, 1899. D. A. Campbell, clerk.

273 And afterward, to wit, on the 8th day of June, 1898, there was rendered by said court and entered of record a certain order in words and figures following, to wit:

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error, *v.* THE CALL PUBLISHING COMPANY, Defendant in Error.	No. 8610. Error from the District Court of Lancaster County.

This cause came on to be heard upon a motion for a rehearing by the plaintiff in error herein; on consideration whereof it is ordered by the court that said motion be, and the same hereby is, overruled.

274 In the Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,
v.
THE CALL PUBLISHING COMPANY, Defendant in Error.

To the Honorable Henry B. Brown, associate justice of the Supreme Court of the United States:

The petitioner, The Western Union Telegraph Company, respectfully shows that at the January, 1899, term, to wit, on the eighth day of March, 1899, the supreme court of the State of Nebraska rendered a final judgment against your petitioner in a certain case wherein The Call Publishing Company was plaintiff and The Western Union Telegraph Company defendant, as will appear by reference to the records and proceedings in said cause, and that the said supreme court of Nebraska is the highest court of said State in which a decision in said State could be had.

And your petitioner claims the right to remove said judgment to the Supreme Court of the United States under the United States statutes authorizing writs of error to State courts (sec. 709 of the Rev. St. U. S., Judiciary act of March 3, 1891; 26 Stat., 826, ch. 517) for the reasons following:

1. That it appears from the record in said cause that an
275 attempt is made therein to regulate by means of the exercise of the judicial powers of the State of Nebraska commerce with foreign nations, among the several States, and with the Indian tribes, in violation of subdivision 3, section 8, art. I, of the Constitution of the United States, and all statutes made in pursuance thereof, of which matter the courts of said State have no jurisdiction, and immunity from which regulation under said constitutional provisions was especially set up and claimed by this petitioner before the said court.

2. That it appears from the record in said cause that all of the telegraphic messages and dispatches, the prices for the collection and transmission of which by this petitioner are sought to be fixed and determined by said action, and which purport and are attempted to be fixed by said judgment, are messages and dispatches transmitted over the telegraph lines of this petitioner between the city of Chicago, in the State of Illinois, and the city of Lincoln, in the State of Nebraska, the same consisting of the reproduction and transmission of items of news previously collected at said city of Chicago from all parts of the world by the Press Association, and at its instance transmitted by this petitioner between the two cities above mentioned, and that an attempt to regulate said prices and charges in the manner aforesaid is in violation of the provisions of the Constitution of the United States and statutes of the United States hereinbefore mentioned, and immunity from which regulation under said provisions was especially set up and claimed by this petitioner in the said court.

3. That it appears from the record in said cause that the petitioner is a corporation duly organized and incorporated by and under the laws of the State of New York, having its principal
276 place of business in said State, and authorized by its charter to construct, maintain, and operate lines of telegraph in and

between various States of the Union, including the State of Nebraska, and that on the 5th day of June, 1867, it duly filed its written acceptance with the Postmaster General of the United States of the restrictions and obligations of an act of Congress entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military, and other purposes," approved July 24, 1866, and that its lines had been constructed and all its business had been transacted under and in accordance with and pursuant to its said charter and said act of Congress, and that by authority of said act its said lines had been constructed and were being maintained over and across the navigable rivers and public lands and traversing the various postal and military roads of the United States, and that by reason of the premises this petitioner was and is obligated for the performance of certain services and subject to certain control and regulation contemplated by such act, or which may be prescribed by the Congress of the United States and the departments and official authorities thereof, by reason whereof the said petitioner, ever since the 5th day of June, 1867, has been and now is a Government agency, free from regulation and control with respect to the matters mentioned in the petition in this action by a State or local authority, legislative or judicial, immunity from which control and from the judgment prayed in said petition and rendered in this action was especially set up and claimed by this petitioner before the said court.

And your petitioner further states that, all the aforesaid grounds and all the rights, privileges, and immunities hereinbefore mentioned having thus been specially set up and claimed before
277 the said supreme court of Nebraska, there was thus drawn in question by your petitioner before the said supreme court of Nebraska the validity of a statute of and the authority exercised by the sovereign State of Nebraska, as being repugnant to the Constitution or laws of the United States, and that the decision of the said supreme court of Nebraska was in favor of their validity, and that there were also specially set up and claimed before said supreme court of Nebraska by your petitioner certain rights, privileges, and immunities under the Constitution, statutes, and authority of the United States, and that the decision of the said supreme court of Nebraska was against the rights, privileges, and immunities thus specially set up and claimed by your petitioner, as aforesaid, all of which appears by the record of the proceedings in said cause, which is hereby submitted.

Wherefore your petitioner prays the allowance of a writ of error, returnable into the Supreme Court of the United States, that the proceedings and judgment of the said supreme court of the State of Nebraska may be revised, modified, vacated, or set aside, as may appear to be required by law, and for citation and supersedeas.

And your petitioner will ever pray, etc.

THE WESTERN UNION TELEGRAPH CO., *Petitioner*,
By F. D. McKENNEY, *Attorney*.

F. D. McKENNEY,
Attorney for Petitioner.

278 [Endorsed:] No. 8610. In the Supreme Court of the United States. The Western Union Telegraph Company *vs.* The Call Publishing Company. Petition for writ of error. Writ allowed & sent. Supreme court of Nebraska. Filed Aug. 2, 1899. D. A. Campbell, clerk. Lowden, Estabrook & Davis, 184 La Salle street, Chicago.

279 In the Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,
v.
THE CALL PUBLISHING COMPANY, Defendant in Error.

Assignment of Errors.

Now comes The Western Union Telegraph Company, plaintiff in error herein, and files the following assignment of errors upon which it will rely — its prosecution of the writ of error in the above-entitled cause:

1. The supreme court of Nebraska erred in affirming the judgment of the district court of Lancaster county, Nebraska, and in rendering a final judgment against the plaintiff in error herein, it appearing from the record of the proceedings in said cause in the supreme court of the State of Nebraska that an attempt is made therein to regulate by means of the exercise of the judicial powers of the State of Nebraska commerce with foreign nations, among the several States, and with the Indian tribes, in violation of subdivision 3, section 8, art. I, of the Constitution of the United States, and all statutes made in pursuance thereof, of which matter the courts of said State have no jurisdiction, and immunity from which regulation under said constitutional provisions was specially set up and claimed by the plaintiff in error before the said court.

2. The supreme court of Nebraska erred in affirming the judgment of the district court of Lancaster county, Nebraska, and in rendering a final judgment against the plaintiff in error herein, it appearing from the record of the proceedings in said cause
280 in the supreme court of Nebraska that all of the telegraphic messages and dispatches, the prices for the collection and transmission of which by the plaintiff in error are sought to be fixed and determined by said action and which purport and are attempted to be fixed by said judgment, are messages and dispatches transmitted over the telegraph lines of the plaintiff in error between the city of Chicago, in the State of Illinois, and the city of Lincoln, in the State of Nebraska, the same consisting of the reproduction and transmission of items of news previously collected at said city of Chicago from all parts of the world by the Press Association and at its instance transmitted by the plaintiff in error between the two cities above mentioned, and that an attempt to regulate said prices and charges in the manner aforesaid is in violation of the provisions of the Constitution of the United States and the statutes of the United States hereinbefore mentioned, and immunity from which

regulation under said provisions was specially set up and claimed by the plaintiff in error in the said court.

3. The supreme court of Nebraska erred in affirming the judgment of the district court of Lancaster county, Nebraska, and in rendering a final judgment against the plaintiff in error herein, it appearing from the record of the proceedings in said cause in the supreme court of Nebraska that the plaintiff in error is a corporation duly organized and incorporated by and under the laws of the State of New York, having its principal place of business in said State, and authorized by its charter to construct, maintain, and operate lines of telegraph in and between various States of the Union, including the State of Nebraska, and that on the 5th day of June, 1867, it duly filed its written acceptance with the Postmaster General of the United States of the restrictions and obligations of an act of Congress entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military, and other purposes," approved July 24, 1866, and that its lines had been constructed and all its business had been
281 transacted under and in accordance with and pursuant to its said charter and said act of Congress, and that by authority of said act its said lines had been constructed and were being maintained over and across the navigable rivers and public lands and traversing the various postal and military roads of the United States, and that by reason of the premises the plaintiff in error was and is obligated for the performance of certain services and subject to certain control and regulation contemplated by such act, or which may be prescribed by the Congress of the United States and the departments and official authorities thereof; by reason whereof the said plaintiff in error, ever since the 5th day of June, 1867, has been and now is a Government agency, free from regulation and control with respect to the matters mentioned in the petition in this action by a State or local authority, legislative or judicial, immunity from which control and from the judgment prayed in said petition and rendered in this action was specially set up and claimed by the plaintiff in error before the said court.

In order that the foregoing assignment of errors may be and appear of record, plaintiff in error presents the same to the court and prays that such disposition may be made thereof as is in accordance with law and the statutes of the United States in such cases made and provided, and such plaintiff in error prays reversal of the judgment made and entered by the said supreme court of the State of Nebraska.

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Attorneys for Plaintiff in Error.

282 [Endorsed:] No. 8610. In the Supreme Court of the United States. The Western Union Telegraph Company vs. The Call Publishing Company. Assignment of errors. Transcript returned by express. H. B. B. Supreme court of Nebraska. Filed Aug. 2, 1899. D. A. Campbell, clerk. Lowden, Estabrook & Davis, 184 La Salle street, Chicago.

283 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Nebraska, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Western Union Telegraph Company, plaintiff in error, and The Call Publishing Company, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the
284 Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears. we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 13th day of July, in the year of our Lord one thousand eight hundred and ninty-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

H. B. BROWN,
Associate Justice of the Supreme Court of the United States.

Bond fixed at $2,500. Sureties approved by U. S. dist. judge.

H. B. B.

285 [Endorsed:] 8610. Western Union Telegraph Co. *v.* Call Publishing Co. Writ of error. Supreme court of Nebraska. Filed Aug. 2, 1899. D. A. Campbell, clerk.

Supreme Court of Nebraska, *ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same, to wit, petition for writ of error, the writ of error, citation, with acknowledgment of service, copy of bond, and assignment of errors.

Seal Supreme Court of Nebraska.

In witness whereof I hereto subscribe my name and affix the seal of said supreme court, at the city of Lincoln, this 9th day of August, 1899.

D. A. CAMPBELL, *Clerk*,
By W. B. ROSE, *Deputy*.

[10-cent U. S. internal-revenue stamp, canceled Aug. 9, 1899. D. A. C.]

286 Know all men by these presents that we, The Western Union Telegraph Company, as principal, and S. H. Burnham and H. S. Freeman, as sureties, are held and firmly bound unto the Call Publishing Company of Lincoln, Nebraska, in the full and just sum of twenty-five hundred dollars ($2,500), to be paid to the said Call Publishing Company of Lincoln, Nebraska, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 14th day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, at a session of the January term, 1899, of the supreme court of the State of Nebraska, in a suit depending in said court between The Western Union Telegraph Company and The Call Publishing Company, Lincoln, Nebraska, and the Western Union Telegraph Company appealing therefrom to the Supreme Court of the United States and having obtained a record and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Call Publishing Company, citing and admonishing them to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said Western Union Telegraph Company, as principal, shall prosecute said appeal to effect and answer all damages and costs if they fail

to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

THE WESTERN UNION TELEGRAPH COMPANY,
By JOHN H. AMES, *Its Attorney.*
S. H. BURNHAM.
H. S. FREEMAN.

Witness:
G. O. SMITH, JR.

287 Approved by—
W. H. MUNGER,
U. S. District Judge.

Approved by—
H. B. BROWN,
Associate Justice, Supreme Court U. S.

Endorsed: 8610. Western Union Telegraph Company *v.* The Call Publishing Co. Bond. Supreme court of Nebraska. Filed Aug. 2, 1899. D. A. Campbell, clerk.

288 UNITED STATES OF AMERICA, *ss:*

To The Call Publishing Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Nebraska, wherein The Western Union Telegraph Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, associate justice of the Supreme Court of the United States, this 13th day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

HENRY B. BROWN,
Associate Justice of the Supreme Court of the United States.

289 Service of the within accepted this 8th day of August, 1899.

CALL PUB. CO.,
By JOHN M. STEWART, *Its Att'y.*

[Endorsed:] 8610. Western Union Telegraph Co. *v.* Call Publishing Co. Citation and acceptance of service. Supreme court of Nebraska. Filed Aug. 8, 1899. D. A. Campbell, clerk.

290 THE STATE OF NEBRASKA, *ss*:

Pursuant to the foregoing writ of error and in obedience thereto, I, D. A. Campbell, clerk of the supreme court of the State of Nebraska, do hereby certify that the above and foregeing contains true and faithful transcripts of all the pleadings, process, proceedings, records, and files in said court in the case of The Western Union Telegraph Company against The Call Publishing Company, and that a copy of said writ of error, duly certified, has been lodged in and remains in my office as said clerk.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Lincoln, Nebraska, this 9th day of August, A. D. 1899.

[Seal Supreme Court of Nebraska.]

D. A. CAMPBELL,
Clerk of the Supreme Court of Nebraska,
By W. B. ROSE,
Deputy Clerk.

[Ten-cent U. S. internal-revenue stamp, canceled Aug. 9, 1899. D. A. C.]

Endorsed on cover: File No., 17,487. Nebraska supreme court. Term No., 117. The Western Union Telegraph Company, plaintiff in error, *vs.* The Call Publishing Company. Filed August 12th, 1899.

No. 117.

FILED
NOV 15 1900
JAMES H. McKENNEY,
Clerk.

Br. of Taggart & Dillon for P. C.

Supreme Court of the United States.

Filed Nov. 15, 1900.

OCTOBER TERM, 1900.

No. 117.

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

vs.

THE CALL PUBLISHING COMPANY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF NEBRASKA.

BRIEF OF PLAINTIFF IN ERROR

RUSH TAGGART,
Attorney for Plaintiff in Error.

JOHN F. DILLON,
Of Counsel.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

Supreme Court of the United States.

WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

AGAINST

THE CALL PUBLISHING COMPANY,
Defendant in Error.

Brief for Plaintiff in Error.

This case comes into this Court on a Writ of Error from the Supreme Court of Nebraska, to reverse a judgment of that Court affirming a judgment entered in the District Court of Lancaster County, Nebraska.

The case in which the judgment was entered was begun in the District Court of Lancaster County, Nebraska, by the defendant in error The Call Publishing Company, against the Western Union Telegraph Company, by the filing of a petition on the 29th day of April, 1891 (Record, p. 6).

The Petition.

The petition sets forth, as the ground of a recovery by the plaintiff, that since July 1, 1888, the plaintiff had been engaged in printing and publishing in the City of Lincoln, Nebraska, a daily newspaper styled

the "Lincoln Daily Call;" that, as such newspaper, it received from the Associated Press dispatches which were transmitted by the Associated Press from the City of Chicago, Ill., to the plaintiff over the telegraph lines of defendant; that the plaintiff had made an arrangement with the Associated Press for the privilege of receiving the dispatches daily, and had no other means of receiving the same, except over the lines of the defendant company; that the amount of these dispatches did not exceed 1,500 words per day, and that the defendant, the Western Union Telegraph Company, a common carrier and transmitter of news by telegraph, charged, demanded and collected of the plaintiff the sum of $75 each month for the transmission of these dispatches from Chicago to Lincoln for the plaintiff; that during all of said period the defendant unjustly and wrongfully discriminated against the plaintiff in that, while the defendant charged the plaintiff the sum of $75 each month for the transmission of dispatches aggregating not over 1,500 words per day, or at the rate of not less than $5 per hundred words, daily, per month, it only charged the State Journal Company, another daily newspaper published in the said City of Lincoln, for the same, like and contemporaneous service at the rate of $1.50 per one hundred words daily per month; that by reason thereof there was an excess charged to the plaintiff for the period from July 1st, 1888, at the rate of $3.50 per hundred words daily per month. Wherefore, the plaintiff alleged it had sustained damages in the sum of $52.50 per month since July 1st, 1888, being the sum of $1,785.

The Answer.

On the 15th of October following the filing of said petition the defendant filed an amended answer, upon which the case was tried, in which there was an admission of its corporate existence, and that it was a telegraph company operating telegraph lines ; it admitted the publication of the paper, and the transmission of dispatches to it over defendant's lines from the Associated Press ; it admitted a contract between defendant and the Associated Press ; admitted the payment of $75 each month for 1,500 words daily, and that the " Nebraska State Journal " received dispatches of the Associated Press for which the said " State Journal " paid the defendant the sum of $125 per month. It denied wrongful discrimination, and alleged that the charges received by it for services which it rendered the plaintiff were not unjust or excessive, and that the same were for dispatches transmitted by it in the day time, and no more than a reasonable compensation for the service rendered, and at no greater rate than it was accustomed to demand, charge and receive by other persons and corporations in the City of Lincoln and elsewhere for the same and similar services.

It also set up its acceptance of the provisions of the Act of Congress of July 24, 1866, and declared that, by virtue thereof, it was invested with an agency for the transmission of messages for the Government of the United States and the officers and several departments thereof, and that the State of Nebraska, its courts and legislature were without authority, power or jurisdiction over it, or to regulate its charges for matter transmitted from the City of Chicago to the

City of Lincoln, Nebraska, such matter being interstate commerce.

Two trials of the case were had. The trial, which resulted in the judgment which this writ of error seeks to set aside, was the second trial of the case, at which the following facts were developed:

The facts as shown in the Record.

Under an agreement dated the 1st of June, 1881, between the Western Union Telegraph Company and the Northwestern Associated Press, there had been continuously, from some time in 1883 or 1884, a service of Associated Press dispatches over Western Union wires from Chicago to Lincoln, Nebraska. The "Nebraska State Journal" was a morning paper published in Lincoln during all those years, and had from the Associated Press what is described in the testimony as a franchise for Associated Press dispatches for publication only in a morning newspaper. This service to the "State Journal" consisted of what was called "the day report" of the Associated Press, consisting of not exceeding twelve to fourteen hundred words daily, and a "night report" consisting of five to seven thousand words. This "day report" the "Journal" was permitted to use for its morning paper, but did not have the privilege of publishing the same in an afternoon paper. The "night report" was sent during the night, up to 3:30 o'clock, A. M., for the morning paper. The "day report" was transmitted whenever the same could be conveniently done through the day, when the wires of the telegraph company were not occupied with other matter, and might be transmitted, and often was,

as late as 6 o'clock in the evening. It was used by the managers of the "Journal," in connection with the "night report," to make up, a complete account of the daily news for its paper the following morning.

A year or two before the 1st of July, 1888, the "State Democrat" was started in Lincoln as an afternoon or evening paper, and desired to obtain the Associated Press "day report" as its source of news. It made application to the Associated Press for these day dispatches, and obtained a certificate entitling it, as the sole newspaper in the City of Lincoln, to receive the "day report" and publish the same in an afternoon paper (Record, p, 117). As a condition prior to negotiations with the Associated Press, it was informed, and so informed the telegraph company, that it would have to make arrangements with the telegraph company for the cost of the transmission of the report. This was required to be done before the manager of the Associated Press would even give the "Daily Democrat" a rate for the news which it was to receive (Record, p. 121).

In order that the day report could be sent to Lincoln in time for publication in the afternoon paper, the publisher of the afternoon paper was advised, as was the fact, that additional facilities in the way of wires would have to be provided, and that an additional operator would be required at Lincoln in order to handle the report in time for the use of the paper (Record, p. 122); and that to furnish these additional facilities and get the report to Lincoln in time a rate of $75 per month would be named for the service from Chicago to Lincoln. This rate was accepted, so far as the testimony discloses, without objection. The additional operator was put on, an additional wire or additional wires were strung to Lincoln, and the

service was begun some time in June, 1887 (Record, pp. 122–27).

Later, the publisher of the "State Democrat" sold the paper to the Call Publishing Company, the plaintiff, and transferred the franchise received from the Associated Press to said purchaser, and thereafter the service was rendered by the defendant the Western Union Telegraph Company to the Call Publishing Company continuously until a short time before the bringing of this suit in April, 1891. Payments to the telegraph company at the rate of $75 per month were made by the plaintiff without objection or protest. A short time before the suit was brought the manager of the plaintiff learned of the rate at which the defendant was forwarding Associated Press dispatches to the "State Journal," and thereupon he demanded of the manager of the local office of the defendant at Lincoln that the matter be righted, and the local manager not making any change in the rate, suit was brought (Record, p. 29).

The record shows that this report after the 1st of July, 1888, was transmitted from Chicago from 11 o'clock until about 4, and as it was transmitted a duplicate copy was made by the use of carbon paper. This duplicate was received by the "State Journal" some time during the afternoon or evening. At night from 7 to 3:30, the night report, varying from four thousand to seven thousand words, was received and delivered to the "State Journal," and the charge by the Western Union Telegraph Company to the "Journal" for the night report, together with the duplicate copy of the day report, was $125 per month (Record, pp. 40, 56, 57).

Testimony was also offered over the objection

of the Telegraph Company respecting the difference in rates which the Telegraph Company charged for the transmission of messages or commercial business by day and by night. There was also some testimony as to the difference between the rates by day and by night for what were known as "special press messages"—that is, single messages sent from parts of Nebraska and elsewhere to a particular newspaper containing information designed for that special paper. There is no testimony in the record except as might be inferred from that above stated that the rate of $75 per month for transmitting fifteen hundred words daily between the hours of 11 o'clock A. M. and four o'clock P. M., was an unreasonable rate. On the contrary, the testimony of the Telegraph Company showed that it was not only reasonable, but, if anything, less than the rates paid to it by newspapers for a similar service at other points (Testimony of Horton, pp. 94 and 95).

The testimony was uncontradicted that, in the day time, the wire facilities of the Telegraph Company to and from Lincoln were taxed by commercial business, market reports and stock quotations, and that it required practically the entire service of a special operator at a salary of $60 a month to take care of the report which was furnished to the Call Publishing Company, and that if the transmission of dispatches to that paper were suspended, the services of one operator could be dispensed with (Record, pp. 72, 74, 91, 92 and 104).

The testimony likewise showed that the transmission of these dispatches to the Call Publishing Company was intermittent and not continuous, but was of such a character as practically to require the continuous

attention of the operator, and that it interfered more or less with the commercial business of the Telegraph Company; that at night there was much less of this commercial business; that all the leased wires busy during the day were at the service of the defendant for the transmission of dispatches, and that the night report was transmitted simultaneously in a continuous stream, not only to Lincoln, but to a large number of other places. In other words, the day report was transmitted only to such places as published an evening paper, whose edition was large enough to afford and pay for Associated Press dispatches in any form; whereas, the night report was transmitted on a circuit touching at all the points where a morning paper was located which could afford to take the Associated Press dispatches as sent from Chicago; that the defendant company could afford to make a very much cheaper rate for the transmission of dispatches at night than by day; in short, that the conditions as to the cost and value of the defendant's service under which these dispatches were sent to the "State Journal" were essentially different from the conditions under which the dispatches were transmitted to the Call Publishing Company (Record, pp. 92, 44, 47, 51, 71).

It was claimed on behalf of the Telegraph Company that these different conditions justified it in making the difference in rates which it did make to these two parties, and that there was nothing in the case warranting a submission to the jury of the question of whether there was an unreasonable rate exacted of the Call Publishing Company, and that the case should not have been submitted to the jury.

The telegraph company, upon the trial of the case,

also insisted that the case should not go to the Jury for the following reasons :

(1) That the petition of the Call Publishing Company did not state any cause of action against the telegraph company.

(2) That there was nothing in the petition, or in the evidence, to show that the rates charged by the telegraph company were unreasonable or extortionate.

(3) That there was no evidence of any unlawful or unjust discrimination against the Call Publishing Company.

(4) That the Courts of the State of Nebraska could not take cognizance of this action to recover alleged overcharges for transmission of messages from Chicago, Illinois, to Lincoln, Nebraska, the same being interstate commerce, in the absence of legislation by Congress.

(5) That the evidence showed, without contradiction, that part of the consideration received by the Call Publishing Company for the $75 per month paid the telegraph company was the sole right from the Associated Press to receive and print the dispatches in an evening paper, and that the value of the different elements of the consideration could not be apportioned by the Court or Jury.

(6) That the services rendered by the telegraph company to the "Lincoln Journal" were not the same, like, and contemporaneous as those rendered to the Call Publishing Company, and, being different, neither

the Court nor Jury had any power to apportion such charges (Record, pp. 20, 131, 132).

Questions duly presented on the record.

These questions were presented by requests and exceptions to the refusal of the Court to charge as requested and by exceptions to the charge as given, and by exceptions to the admission of evidence respecting the telegraph company's commercial rates by day and by night, and its day and night rates for the transmission of special press messages (Record, pp. 17, 14, 15, 16, 18, 46, 47, 63, 64, 67).

The first request to charge asked by the defendant and refused by the court raises the question whether under this entire testimony the plaintiff is entitled to any recovery upon the law of the case under any view of the testimony (Record, p. 17).

The exceptions to the charges given by the court likewise raise the same question (See charges given, 2, 3, 4, 5, 6 and 7, Record, pp. 14, 15 and 16).

Errors assigned.

The following errors are assigned upon this record:

1. The supreme court of Nebraska erred in affirming the judgment of the district court of Lancaster county, Nebraska, and in rendering a final judgment against the plaintiff in error herein, it appearing from the record of the proceedings in said cause in the supreme court of the State of Nebraska that an attempt is made therein to regulate by means of the exercise of the judical powers of the State of Nebraska commerce with foreign nations, among the several States, and with the Indian tribes, in violation of subdivision 3, section 8, art. I., of the Constitution of the United States, and all statutes made in pursuance thereof, of

which matter the courts of said State have no jurisdiction, and immunity from which regulation under said constitutional provisions was specially set up and claimed by the plaintiff in error before the said court.

2. The supreme court of Nebraska erred in affirming the judgment of the district court of Lancaster county, Nebraska, and in rendering a final judgment against the plaintiff in error herein, it appearing from the record of the proceedings in said cause in the supreme court of Nebraska that all of the telegraphic messages and dispatches, the prices for the collection and transmission of which by the plai tiff in error are sought to be fixed and determined by said action, and which purport and are attempted to be fixed by said judgment, are messages and dispatches transmitted over the telegraph lines of the plaintiff in error between the City of Chicago, in the State of Illinois, and the city of Lincoln in the State of Nebraska, the same consisting in the reproduction and transmission of items of news previously collected at said city of Chicago from all parts of the world by the Press Association, and at its instance transmitted by the plaintiff in error between the two cities above mentioned, and that an attempt to regulate said prices and charges in the manner aforesaid is in violation of the provisions of the Constitution of the United States and the statutes of the United States hereinbefore mentioned, and immunity from which regulation under said provisions was especially set up and claimed by the plaintiff in error in the said court.

3. The supreme court of Nebraska erred in affirming the judgment of the district court of Lancaster county, Nebraska, and in rendering a final judgment against the plaintiff in error herein, it appearing from the record of proceedings in said cause in the supreme court of Nebraska that the plaintiff in error is a corporation duly organized and incorporated by and under the laws of the State of New York, having its principal place of business in said State, and authorized by its charter to construct, maintain and operate lines of telegraph in and between various States of the Union, including the State of Nebraska, and that on the 5th day of June, 1867, it duly filed its written acceptance with the Postmaster General of of the United States of the restrictions and obligations of an act of Congress entitled "An Act to aid in the construction of telegraph lines, and to secure to the

Government the use of the same for postal, military, and other purposes," approved July 24, 1866, and that its lines had been constructed and all its business had been transacted under and in accordance with and pursuant to its said charter and said act of Congress, and that by authority of said act its said lines had been constructed and were being maintained over and across the navigable rivers and public lands and traversing the various postal and military roads of the United States, and that by reason of the premises the plaintiff in error was and is obligated for the performance of certain services and subject to certain control and regulation contemplated by such act, or which may be prescribed by the Congress of the United States and the departments and official authorities thereof; by reason whereof the said plaintiff in error, ever since the 5th day of June, 1867, has been and now is a Government agency, free from regulation and control with respect to the matters mentioned in the petition in this action by a State or local authority, legislative or judicial, immunity from which control and from the judgment prayed in said petition and rendered in this action was specially set up and claimed by the plaintiff in error before the said court.

The Federal Questions.

The Federal questions presented upon this record are :

First. Is there a Federal or general common law attaching to and defining the obligations of common carriers engaged in interstate business which is enforceable by the State courts?

Second. If there is such a Federal or general common law, has it been violated by the Telegraph Company in this particular instance?

And under the foregoing, it is maintained that under the constitution, laws and authority of the United

States neither the petition nor proofs showed any cause of action against the telegraph company.

I.

Is there a Federal or general common law attaching to and governing common carriers or instrumentalities engaged in interstate commerce?

The Supreme Court of Nebraska, in passing upon the case, thus states its conclusion :

" We are satisfied from a review of the subject that in actions of the nature of the present, in the absence of national legislation, the principles of the common law or general jurisprudence of the State of the action are applicable and may be asserted and enforced, and in this State the common-law right of action is granted full force and scope. Chicago, R. I. & P. R. Co. v. Witty, 32 Neb., 275 ; Atchison, T. & S. F. R. Co. v. Lawler, 40 Neb., 356 ; Missouri P. R. Co., v. Tietken, 49 Neb., 130 ; Chicago, B. & Q. R. Co. v. Gardiner, 51 Neb., 70 ; St. Joseph & G. I. R. Co. v. Palmer, 38 Neb., 463 ; Union P. R. Co. v. Vincent, filed Feb. 23, 1899 " (Record, pp. 129–130).

From this quotation, it would seem that the Court in affirming the judgment in this case did so upon the theory that the enforcement of the common law, as interpreted and defined by the Courts of Nebraska, as the law of that State, entitled the plaintiff to maintain this action.

In the two preceding paragraphs the Court seems to hold the view, that there is a general common law, applying to all the States alike. We will consider this view of the case later.

It will be remembered that the plaintiff's complaint shows that he is seeking to recover back moneys paid for alleged excessive charges from July 1, 1888, to April, 1891, for the transmission of dispatches from the City of Chicago, Illinois, to the City of Lincoln, Nebraska. He paid therefor, as he alleges, at the rate of $75 per month, or $5 per hundred words daily, per month. During the same period the State Journal Company received the dispatches of the Associated Press over the telegraph lines of the defendant from Chicago, Illinois, to Lincoln, Nebraska, at the rate of one dollar and fifty cents per hundred words daily per month. Plaintiff's claim is, that he is entitled to recover the difference, or $3.50 per hundred words daily, per month, for this entire period (Record, pp. 5, 6). The contract shows that the price fixed by the telegraph company, and paid by the plaintiff was a unit, for this service from Chicago to Lincoln, and not in any way distributable or separable into parts bounded by state lines (Record, p. 122).

The first question, therefore, which arises is, *Is it possible that the common law, as interpreted and enforced by the Courts of Nebraska, can have any application to this service rendered to this Publishing Company by the telegraph Company over its lines through the States of Illinois, Iowa and Nebraska, or to any part of this service, as suggested by the Supreme Court of Nebraska in the part of the opinion quoted above?*

The claim of the telegraph Company has been at all times in this case that the regulation or control of the rates for this service were wholly withdrawn by the provisions of subdivision 3, section 8, article 1 of the Constitution of the United States, from the operation of State laws, whether statutory or common. If we are

right upon this question, the Supreme Court of Nebraska was wholly wrong upon that feature of their decision, by which they upheld the judgment in this case, upon principles of the common law as interpreted and applied in that State as a part of its jurisprudence.

It ought not to require any argument at this day in this court to the point that the question of the rates at which telegraph or other companies shall perform interstate service are wholly withdrawn from State cognizance and control. Although telegraph companies, strictly speaking, are not common carriers, yet so far as this case is concerned, we do not think it important to insist upon any distinction between their obligations to the general public and those of common carriers. This Court in Pensacola Telegraph Co. vs. Western Union Telegraph Co., 96 U. S., 1, in Telegraph Co. vs. Texas, 105 U. S., 460, and in other cases, has fully settled the question that the Western Union Telegraph Company is engaged in interstate commerce, and as such is entitled to the same exemptions from State control and supervision as railways or other common carriers. The rates which it shall charge its patrons, like the rates which railway companies may charge for the carriage of freights in the transaction of business between the States are alike removed from the supervision of State legislatures declaring what the rates shall be for such interstate traffic, or of State courts seeking to enforce the common law regulations and rules.

It is not necessary to make extended quotations from the cases in this Court to the effect that under this section of the Constitution the jurisdiction of Congress over this whole subject matter of rates for the carriage of interstate commerce is exclu-

sive. Since the decision in the case of Cooley vs. The Board of Wardens (12 How., 299), the rule has been consistently followed that whatever subjects of this power over interstate commerce are in their nature national, or admit only of one uniform system or plan of regulation may justly be said to be of such nature as to require exclusive control by Congress. This rule, we say, has never been departed from, but has been consistently upheld by the decisions of this Court among which are:

Crandall vs. Nevada, 6 Wall., 35, 42.
Hinson vs. Lott, 8 Wall., 148, 152.
Ex Parte McNeil, 13 Wall, 236, 242.
Case of the State Freight Tax, 15 Wall., 232, 280.
Osborne vs. Mobile, 16 Wall., 479, 482.
R. R. Co. vs. Fuller, 17 Wall., 560, 569.
The Lottawanna, 21 Wall., 558, 582.
Henderson vs. Mayor of N. Y., 92 U. S., 259, 272.
Packet Co. vs. Keokuk, 95 U. S., 80, 88.
Pound vs. Turck, 95 U. S., 459, 463.
Hall vs. De Cuir, 95 U. S., 485, 488, 497.
Ex Parte Siebold, 100 U. S., 371, 385.
Wilson vs. McNamee, 102 U. S., 572.
County of Mobile vs. Kimball, 102 U. S., 691, 697.
Packet Co. vs. Parkersburg, 105 U. S., 559, 563.
Turner vs. Maryland, 107 U. S., 38, 56.
Transportation Co. vs. Parkersburg, 107 U. S., 691, 702.
Brown vs. Houston, 114 U. S., 622, 630.
Walling vs. Michigan, 116 U. S., 446, 456.
Morgan vs. Louisiana, 118 U. S., 455, 465.
Wabash, &c., Ry. Co. vs. Ill., 118 U. S., 557, 585.

Robbins vs. Shelby Taxing Dist., 120 U. S., 489, 492.
Ouachita Packet Co. vs. Arden, 121 U. S., 444, 447.
Philadelphia Steamship Co. vs. Pennsylvania, 122 U. S., 326, 339.
Bowman vs. Chicago & N. W. Ry., 125 U. S., 465, 481.
Kidd vs. Pearson, 128 U. S., 1, 23.
Stoutenburgh vs. Hennick, 129 U. S., 141, 148.
Leisy vs. Hardin, 135 U. S., 100, 109.

The precise question involved here, so far as it relates to the common law of the State, has, we believe, not been directly involved in any of these decisions. The question in many of these cases arose upon legislation which affected, and sought to control the rates for transportation of passengers or freight over the railways, or directly affected interstate commerce in some other manner.

Is there therefore any legitimate distinction between a statute of a State enacted by the legislature, seeking to regulate or control the rates which the carrier may collect for interstate services rendered, and the common law as enforced in the State tribunals, and construed by those tribunals as applicable to the common carrier, seeking to accomplish the same end?

The Supreme Court of Nebraska decides in this case in effect that there is this difference. In Wabash Ry. Co. vs. Illinois, cited *ante*, it is very clearly implied in the opinion rendered by Mr. Justice MILLER that by no method of proceedure, whether by legislation, or by decision of its Courts in enforcing the common law of the State, could the State of Illinois control the rate of

freight for shipments beyond the boundaries of the State. He says (p. 577):

"Of the justice or propriety of the principle which lies at the foundation of the Illinois statute it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the State, it may be very just and equitable, and it certainly is the province of the State legislature to determine that question. But when it is attempted to apply to transportation through an entire series of States a principle of this kind, and *each one of the States shall attempt to adopt its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the States and upon the transit of goods through those States cannot be overestimated.* That this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been said. And if it be a regulation of commerce, as we think we have demonstrated it is, and as the Illinois court concedes it to be, it must be of that national character, and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the Congress of the United States under the commerce clause of the Constitution."

If this is true with respect to a statute of the State, it is impossible to present a good reason for the proposition, that the State of Nebraska is entitled to have the service which the Telegraph Company rendered to the Publishing Company from Chicago to Lincoln, through the States of Illinois, Iowa and Nebraska, tested by the local common law of the State of Nebraska. Clearly the common law of Nebraska cannot apply to any service rendered beyond the limits of that State in view of the provisions of the Federal Constitution, and it is utterly illogical to test the rights of the Telegraph Company with regard to services rendered by it, in

the three States, as a unit, by the construction of the law as made in one of those three States. The common law is interpreted differently in the different States. It may mean one thing in Iowa and a very different thing in Illinois or Nebraska.

In U. S. vs. Worrall (2 Dall., 284), CHASE, J., said :

" Each colony judged for itself what parts of the common law were applicable to its new condition, and in various modes, by legislative acts, by judicial decisions, or by constant usage, adopted some parts and rejected others. Hence,

" Through the different States it was soon discovered that the whole of the common law of England has been nowhere introduced ; that some States have rejected what others have adopted, and that there is, in short, a great and essential difference in the extent to which the common law is applied. The common law, therefore, of one State is not the common law of another ; but the common law of England is the common law of each State, so far as each State has adopted it."

The same principles and the same necessities which Mr. Justice MILLER indicates as the reason for a national regulation by Congress, apply to a statute or to an attempt to regulate rates or control the same by the application of the principles of the common law, as expounded and applied by any particular State. The difficulties attending the position of the Court of Nebraska in attempting to test this service from Chicago to Lincoln by the local law of Nebraska are obvious at a glance.

Upon this point the language of Justice MATTHEWS found in the opinion in Bowman vs. Chicago, &c., Ry. Co. (125 U. S.) at page 486, is very pertinent :

" In the present case defendant is sued as a common carrier in the State of Illinois, and the breach of duty alleged against it is a violation of the law of that State, in refusing to receive and transport goods which, as a common carrier, by that law, it was bound to accept

and carry. It interposed as a defense a law of the State of Iowa, which forbids the delivery of such goods within that State. Has the law of Iowa any extra-territorial force which does not belong to the State of Illinois? If the law of Iowa forbids the delivery, and the law of Illinois requires the transportation, which of the two shall prevail? How can the former make void the latter? In view of this necessary operation of the law of Iowa, if it be valid, the language of this court, in the case of Hall vs. De Cuir (95 U. S., 485, 488) is exactly in point. It was there said: 'But we think it may safely be said that State legislation which seeks to impose a direct burden upon interstate commerce or to interfere directly with its freedom does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without or goes out from within. While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the State, or taken up within to be carried without, cannot but affect to a greater or less degree those taken up without and brought within, and sometimes those taken up within and put down without. * * * If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay, more; it could prescribe rules by which the carrier must be governed within the State, in respect to passengers and property brought from without. On one side of the river or its tributaries, it might be required to observe one set of rules and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier or passengers can conduct his business with satisfaction to himself or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept

separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it, Congress, which is untrammelled by State lines, has been invested with the exclusive legislative power of determining what such regulations shall be."

We submit, therefore, that this judgment cannot be sustained upon the ground that it is in harmony with the common law of Nebraska as announced in certain decisions of the Supreme Court of that State.

There is no Federal Common Law.

If the provisions of the Federal Constitution to which we have referred, and the exclusiveness of the congressional jurisdiction over the subject of rates applicable to interstate commerce prevent the application of the statutory or common law of Nebraska, then the question recurs, IS THERE ANY FEDERAL COMMON LAW DEFINING THE RELATIONS AND DUTIES OF THE TELEGRAPH COMPANY AS A *QUASI* COMMON CARRIER, WHICH CAN BE ENFORCED BY APPROPRIATE ACTION IN THE STATE COURT?

Here, again, the decision of the Supreme Court of Nebraska is directly in a conflict with many holdings of this court and as we believe of all the other State courts which have had occasion to consider the question. For the court, in answer to the contention of the Telegraph Company that there was no Federal common law upon the subject, says:

"It is argued that the petition did not state a cause of action. The reasons given for this contention are that the pleading attacked declared upon a contract for interstate business; that the regulation of such business rests exclusively with Congress; that the statutes

of Nebraska by which it was sought to establish rules on the subject were ineffective; that there was no regulative national law applicable and no rules of the common law in force or recognized as national rules or enforceable within the nation as an entirety, or within the States composing it or any one thereof, which in the absence of statutory enactment by Congress might be invoked and be governable" (Record, p. 129).

Then, after a review of some cases bearing upon the question, there is the conclusion already considered that the principles of the common law or general jurisprudence of the State may be asserted and enforced.

The contention was consistently and continuously made upon the trial by the telegraph company that as to the State Law it could not apply for the reasons already given, and that in the absence of a statute by Congress declaring a rule as to interstate traffic by the Telegraph Company such as was appealed to by the Publishing Company, there was no law upon the subject.

This Court has, time and time again, very clearly, as we think, settled the proposition that there is no Federal common law. In the opinion of the Supreme Court of Nebraska, that court cites the opinion of this Court, in C. M. & St. P. R. R. vs. Solan, 169 U. S., 133, as fully recognizing a law of general jurisprudence which might be applied in a State court or in a Federal Court (Record, p. 129). But an examination of the opinion of Mr. Justice GRAY in that case shows, that, in writing the opinion, there was not in his mind any thought of a general Federal common law, which applies to railroad carriers engaged in interstate commerce. For he says (p. 137):

"Railroad corporations, like all other corporations and persons doing business within the territorial jurisdiction of a State, are subject to those laws. It is in

the law of the State that provisions are to be found concerning the rights and duties of common carriers of persons or of goods and the measures by which injuries resulting from their failure to perform their obligations may be prevented or redressed. Persons traveling on interstate trains are as much entitled, while within a State, to the protection of that State as those who travel on domestic trains. A carrier exercising his calling within a particular State, although engaged in business of interstate commerce, is answerable according to the law of the State for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if, being engaged in the transportation of passengers, he inflicts injury upon the person of a passenger brought from another State, the right of action for the consequent damage is given by the local law. * * * It is equally within the power of the State to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, the State has the power to redress and punish. The rules prescribed for the construction of railroads and for their management and operation designed to protect the person and property otherwise injured by their use, are strictly within the scope of the local law thereof in this regulation of interstate commerce, although they control in some degree the conduct and liability of those engaged in such commerce."

This Court has, moreover, in a long line of cases, settled the question, as we think, conclusively, that there is no national common law. The courts of the United States do in actions between citizens of different States, enforce a common law constantly, but it is the municipal law or common law of the State which is thus enforced and not a national common law.

Perhaps the fullest consideration of this question is found in the opinion of Mr. Justice MATTHEWS in Smith vs. Alabama (124 U. S., 465), in which case was considered the question of the right of the State of Ala-

bama to enforce a requirement that engineers handling trains for the transportation of passengers or freights in or through that State, should first undergo an examination and receive a license from the State. Upon the precise question we are considering, Justice MATTHEWS says (p. 476) :

" It is among these laws of the States, therefore, that we find provisions concerning the rights and duties of common carriers of persons and merchandise, whether by land or by water, and the means authorized by which injuries resulting from the failure properly to perform their obligations may be either prevented or redressed. A carrier exercising his calling within a particular State, although engaged in business of interstate commerce, is answerable according to the laws of the State for acts of nonfeasance or misfeasance committed within its limits. If he fail to deliver goods to the proper consignee and at the right time or place, he is liable in an action for damages, under the laws of the State, in its courts ; or if by negligence in transportation, he inflicts injury upon the person of a passenger brought from another State, a right of action for the consequent damage is given by the local law. * * *

" But for the provisions on the subject found in the local law of each State, there would be no legal obligation on the part of the carrier, whether *ex contractu* or *ex delicto*, to those who employed him ; or if the local law is held not to apply where the carrier is engaged in foreign or interstate commerce, then, in the absence of laws passed by Congress, or presumed to be adopted by it, there can be no rule of decision based upon the rights and duties supposed to grow out of the relation of such carriers to the public or to individuals. In other words, if the law of the particular State does not govern that relation and prescribe the rights and duties which it implies, then there is, and can be no law that does until Congress expressly supplies it, or is held by implication to have supplied it, in cases within its jurisdiction over foreign and interstate commerce. The failure of Congress to legislate can be construed only as an intention not to disturb what already exists and is the mode by which it adopts, for cases within the scope of its power, the State law, which until displaced covers the subject.

"There is no common law of the United States in the sense of a national customary law distinct from the common law of England as adopted by the several States, each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes. Wheaton vs. Peters, 8 Pet., 591. A determination in a given case of what that law is may be different in a Court of the United States from that which prevails in the judicial tribunals of a particular State. This arises from the circumstance that courts of the United States, in cases within their jurisdiction where they are called upon to administer the law of the State in which they sit, or by which the transaction is governed, exercises an independent, though concurrent jurisdiction and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of Railroad Co. vs. Lockwood, 17 Wall., 357, where the common law prevailing in the State of New York in reference to the liability of common carriers for negligence, received a different interpretation from that placed upon it by the judicial tribunals of the State; but the law as applied is none the less the law of the State."

In Wheaton vs. Peters, 8 Pet., 591, Justice M'LEAN says (p. 658):

"But, if the common-law right of authors were shown to exist in England, does the same right exist and to the same extent in this country?

"It is clear there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent States, each of which may have its local usages, customs and common law. There is no principle which pervades the Union and has the authority of law that is not embodied in the Constitution and laws of the Union. The common law could be made a part of our federal system only by legislative adoption. * * * It is insisted that our ancestors, when they migrated to this country, brought with them the English common law as part of their heritage.

"That this was the case to a limited extent is admitted. No one will contend that the common law, as it existed in England, has ever been in force in all its provisions in any State in this Union. It was adopted so far only as its principles were suited to the condi-

tion of the colonies; and, from this circumstance, we see what is common law in one State is not so considered in another. The judicial decisions, the usages and customs of the respective States must determine how far the common law has been introduced and sanctioned in each."

In Bucher vs. Railroad Co. (125 U. S., 555), in the opinion by Mr. Justice MILLER, at page 583, it is said:

"There is no common law of the United States, and yet the main body of the rights of the people of this country rests upon and are governed by principles derived from the common law of England, and established as the laws of the different States. Each State of the Union may have its local usages, customs and common law (Wheaton vs. Peters, 8 Pet., 591; Pennsylvania vs. Wheeling Bridge Co., 13 How., 519)."

To the same effect is Willamette Iron Bridge Co. vs. Hatch, 125 U. S., 1.

The whole question is also carefully considered in the opinion of Justice BETTS, printed as appendix to case, *in Re* Barry, 136 U. S., p. 597:

Cases in Point.

But upon the precise question we are considering in the case at bar there have been several decisions which are directly in point.

In Swift vs. Philadelphia & R. R. Co. (58 Fed. Rep., 858) this question was raised in the Circuit Court of the United States for the District of Illinois, before Judge GROSSCUP, upon suits brought against the railway company to recover back alleged illegal exactions for the transportation of freight from Chicago to New York. The question was raised by a demurrer to the declaration filed, and involved the precise point presented

in this record. Judge GROSSCUP says, page 859, upon this question :

" The general question raised by the demurrer is whether there is any law, common or statutory, applicable to the transaction set forth, which prohibits the exaction of unreasonable rates, or affects any contract between the shipper and carriers whereby unreasonable rates are stipulated for and taken. There can be no question that, in the absence of such prohibition or restraint, a common carrier can lawfully demand or contract for such compensation for carriage as he may be able to obtain. His privileges would in such cases be like those of any other person, and subject only to the economic laws which flow from trade and competition. If there is any municipal law which supersedes or supplements these economic laws, and subjects the carrier to restraints or regulations not imposed upon general business, it must be found either in the municipal law of the States or in a law of the United States.

" It is not disputed that within the territory of the States and upon subjects affected by state law, such a prohibition exists. It is one of the restraints embodied in the common law of England, and is, therefore, in force within every jurisdiction where the common law is the law of the land. It seems to me equally clear that, outside of the interstate commerce act, there is no law of the United States, as a distinct sovereignty, imposing such restraint. The United States as a distinct sovereignty, imposes no laws upon its subjects, except such as are expressly or impliedly enacted by Congress. Congress has not adopted the common law of England as a national municipal law. The courts of the United States have had many occasions to enforce the common law, but in every instance it has been as the municipal law of the state by which the subject matter was affected. Outside of the interstate commerce act there is no enactment of Congress and no self-operating provision of the Federal Constitution which expressly or by implication evidences a command or purpose to interfere with the freedom of interstate commerce, or lay any restraint upon the rights of carriers or shippers engaged therein (Welton vs. State of Missouri, 91 U. S., 282; Brown vs. Houston, 114 U. S., 622).

" The question then arises, Is the municipal law of the state applicable to the transactions set forth in the

declaration? Is the act or contract of a carrier who accepts goods for carriage from one State into another, subject to that particular provision of the municipal law of the several states where the goods are taken or through which they are conveyed, which prohibits the exaction of unreasonable rates? There can be no doubt that to congress is given, by the constitution, the absolute power to regulate commerce between the states. This power, independently of legislation, is not necessarily exclusive of the right of the states to reasonably regulate such incidents of interstate commerce, lying within their respective jurisdictions as wharves, pilots, harbors, roads, bridges, etc. * * * The application of state law in such cases is not inconsistent with the general power conferred upon Congress, and does not introduce into commerce between the states either confusion or restraint. * * * But the fixing of a rate for the carriage of goods from one state to another is not simply an incident of or appurtenant to commerce, but is the very core and essence of interstate commerce. * * * How can Illinois determine what is a reasonable charge for carriage across Indiana, Ohio or Pennsylvania? The reasonableness of such rate depends among other things upon the cost of construction and wages paid beyond her jurisdiction; the amount of capitalization allowed and taxes and assessments exacted by other jurisdictions; the terms of contracts for the interchange of freight between carriers, made and allowed under the laws of other states, and the amount of traffic carried which may in turn be affected by the laws of the other states governing the acquisition of or consolidation with other lines. These and many others are the elements of the cost of carriage, and before the reasonableness of a rate can be determined the cost must be ascertained. The reasonableness of rates for such long distances and over different methods of conveyance can only be approximately ascertained at best by men of special learning and equipment in such matters. Is it possible that the constitution contemplates that such learning can be found in the courts and juries of every county traversed by a line 1,000 miles long? I am of the opinion that a rate for the carriage of interstate commerce, dependent, as it is, for its reasonableness upon so many different considerations of expenditure, business, and interpretation of the laws of different states, is essentially a national

affair, and its regulation is therefore exclusively national. * * * It follows, therefore, that in my opinion the local municipal law of the several states is not applicable to the reasonableness of these rates, and cannot be appealed to as a basis for suits such as these."

The foregoing opinion by Judge GROSSCUP was followed by a second opinion in the same case reported in the 64th Federal Reporter, 59, where the question was again presented to the same judge, who carefully reviewed his former opinion, and reached the same result. He says (p. 69):

"Having duly considered these criticisms upon and variations from my former holding by some of the judges of the other circuits, I remain of the opinion that there is no national, common or general law, in the sense of a rule of civil conduct, prescribed by the nation as sovereign which may be made the basis of an action to recover back rates, simply because the court may find them to be unreasonable. So far as existing law applicable to the subject of rates in interstate commerce was concerned prior to the interstate commerce act, the shipper and carrier were at liberty to make such contract as they could agree upon; and such a contract would be left untouched, unless for such reasons as would justify the abrogation of contracts between other parties and upon other subjects."

Later the question was presented to the Supreme Court of Iowa in the case of Gatton vs. Chicago, R. I. & P. Ry. Co. (95 Iowa, 112). This was an action to recover overcharges on freight shipped over defendant's line between interstate points of railway, before the interstate commerce law took effect. To the petition filed the defendant pleaded the statute of limitations for one defense, and as another and separate defense that all of said shipments were interstate shipments and pertained exclusively to commerce between the

States; that when said shipments were made the Congress of the United States had not enacted any statute regulating or pertaining to shipments of that character, and that the power to regulate commerce between the several States was vested exclusively in Congress, and at the time the shipments were made there was no statute, or any rule of common law governing or applicable to said shipments or prohibiting any discrimination or preference in rates. To these defenses the plaintiff demurred, and thus was raised the precise question which we have presented upon the record in the case at bar. The court consider the following questions, first, whether there is any national common law which is applicable to shipments of this character; second, whether Section 8 of Article 1, subdivision 3, of the Federal Constitution excludes the jurisdiction of the States. After a very careful and thorough consideration of the authorities bearing upon the subject under both heads, to which we invite the careful attention of this court, the Court say:

"No right of recovery, then, in this case is or can be given by virtue of the statutes of the states, it being a matter exclusively within the jurisdiction of Congress. No statute of the United States creates a right in such cases. If, then, there exists any right of recovery, it must be by virtue of the existence of the common law as a recognized part of our national system of jurisprudence. We have said that the constitution of the United States did not of itself recognize the common law as a system of jurisprudence of national application. Even if it should be conceded that efficacy could be given to such a system and make it of national application, in the absence of constitutional or statutory recognition, by means of judicial decisions of the United States Supreme Court, a point not necessary for us to decide, do the decisions of that court go that extent? That court has never determined the precise question involved in this action, but it has passed upon questions of interstate commerce and its attempted regulation by the states."

Then after further consideration of the cases claimed to support the contention that there was a national common law, the Court say:

" Counsel contend that the common law of the several states 'is one entire body or system of law, and its rules and principles are the same,' no matter in what state they may be administered. If it be true that the rules and principles of the common law are the same in all of the states—a proposition which we think is hardly true—still it is true that the same common law is differently construed in the different states and jurisdictions. Thus, in one state it may be held that the common law did not permit discriminations and in another that it did. Hence it is that we find the federal courts in certain cases, some of which we have quoted, holding that in determining what the common law, as enacted, adopted or recognized by the state, is, they will not be bound by the interpretation given thereto by the state courts. Again, it is undeniable that in any state in which the common law may be in force, the legislature may alter it or set it aside. So if the appellant's contention is correct and the common law applicable to each state should control as to regulating charges for interstate commerce, we might have one common-law rule affecting such shipments in Iowa and a different rule in Illinois, or the same rule differently interpreted. The result would be that an act of the carrier of an interstate shipment through Iowa and Illinois might be legal in one state and illegal in the other. It is manifest that such a state of affairs cannot exist. *So, too, in this* connection it may be said that inasmuch as the constitutional right conferred upon Congress to regulate interstate commerce is exclusive—and as we have shown, it is held that, in the absence of legislation by Congress upon the subject, it was manifest that Congress intended to leave such commerce free and unfetterd by any positive regulations—such intention would be contravened as much by any common-law rules operating as regulations of such commerce as by an express statute of the state having a like effect. In other words, the power to regulate interstate commerce has, by the Federal Constitution, been withdrawn as a subject of legislation from the several

states, and the constitutional provision seems to us to be equally effective as against such regulations based upon any common-law rule in force in a state. This view, we think, is clearly supported by the cases heretofore cited. * * *

" There are other reasons which impress us with the correctness of the result reached by the lower court, but we must forego a discussion of them. Our conclusion is that there is no national common law ; that the state cannot regulate inter-state commerce in the absence of congressional action, either by express statutory enactment or through the medium of the common law which may be recognized as in force in such state ; that the right claimed in this case would amount to a regulation of commerce between the states, as defined by the Federal Supreme Court, and hence is in contravention of the Federal Constitution."

The Supreme Court of Nebraska, in support of the conclusion that there is a law of general jurisprudence which might be applied by a state court, cited the American and English Cyclopedia of Law, second edition, vol. 6, pp. 285, 286. But an examination of this citation utterly refutes the suggestion contained in the opinion that it sustains any such doctrine. At page 285 the text thus states the principle :

"6. National Common Law. It is well settled that the common law constitutes no part of our national jurisprudence. The several states composing the Federal Government are sovereign and independent, possessed of their own customs, usages and common law, and no principle pervades the union which has not the the authority of and is not embodied in the constitution or laws of the national government. The common law could be incorporated into the federal system only by legislative adoption."

Note 4 to this paragraph is as follows :

" 4. No national common law," citing :

Wheaton vs. Peters, 8 Pet. (U. S.), 658.
Bucher vs. Cheshire R. Co., 125 U. S., 558.

Kendall vs. U. S., 12 Pet. (U. S.), 613.
U. S. vs. Hudson, 7 Cranch (U. S.), 32.
U. S. vs. Coolidge, 1 Wheat. (U. S.), 415.
U. S. vs. Worrall, 2 Dall. (U. S.), 384.
Moore vs. U. S., 91 U. S., 270.
In re Barry, 42 Fed. Rep., 113.
Murray vs. Chicago, etc., R. Co., 62 Fed. Rep., 24.
Lorman vs. Clarke, 2 McLean (U. S.), 568.
People vs. Folsom, 5 Cal., 374.
Faust vs. Judge, 30 Mich., 266.
See, also, Bains vs. The Schooner James, 1 Baldw. (U. S.), 544.
Forepaugh vs. Delaware, etc., R. Co., 128 Pa. St., 217 ; 15 Am. St. Rep., 672.

In other State courts, where the question has been raised, the same conclusion reached by Judge GROSSCUP, and by the Supreme Court of Iowa seems uniformly to have been reached. Thus, in Garner vs. Wright, 52 Ark., 388, it is said with respect to a controversy over a mortgage between citizens of the Indian Territory, where no proof was offered of the laws in force in the Territory applicable to the matter, and the question was whether the presumption obtained that the common law was in force, the court say :

" This presumption is indulged as to those states only that have taken the common law as the basis of their jurisprudence. Such a presumption would not be indulged as to the laws of the states of Louisiana and Texas, because we know that their jurisprudence is founded upon a different system. The same reasons forbid such a presumption as to the laws of the Indian Territory, for we know that no system of law has been adopted there. * * * There is no federal law on the subject. We have no proof of and can indulge no presumption as to local laws in force there."

Likewise in the case of People vs. Folsom (5 Cal., 374), where a question arose respecting the right of succession to the property of a subject of Denmark, who died seized of property in California, the court say (p. 378):

"On the death of Leidesdorff, his mother, by the rule of natural justice, became entitled to the possession and could not be disturbed until office found. No such judicial proceeding was instituted and no act of the Mexican government was done to divest her defeasible estate. While things remained in this condition the treaty was ratified, and California became a territory of the United States. With the change of flags there was a change of political laws.

"It now remains to be seen whether this was a political law or not. The authorities that I have cited, as well as the ordinances and decrees of Mexico cited by the Attorney-General, leave no room to doubt this. If laws regulating the admission of foreigners and aliens and placing them under peculiar disabilities on account of some supposed inconvenience which may result to the state are not political, it would be difficult to find any law that was. Now, there is no common law of the United States, as contradistinguished from individual states, and the courts of the United States, instead of administering the common law or any particular system, conform to the laws of the states where they are situated; so that the acquisition of California did not extend over it the common law which recognizes and sustains the doctrine of escheats; for in that case there would have been a continuation of the same political law; but, in the absence of any law on the subject, the principles of the common law would prevail as well as the principles of jurisprudence that any one may inherit who is not expressly prohibited."

In Phipps vs. Harding (70 Fed. Rep., 468) the question of the existence of a general commercial law was presented to the Circuit Court of Appeals of the Seventh Circuit. The question arose upon the endorsement of a promissory note, where parties had placed their names upon the back before delivery to the payee.

It was claimed that the general commercial law could not be affected by a statute of Massachusetts relating to this subject. Judge JENKINS, delivering the opinion of the court, says (p. 475):

"The contention that this statute of Massachusetts is invalid and inoperative goes to the extent of depriving the state of power to legislate with respect to the law merchant. It presents a bold and far-reaching proposition, striking at the root of power in the respective states to which we are not prepared to yield assent. We are referred to no provision of the Constitution which expressly or impliedly inhibits the exercise of such power by the state. The contention assumes that there is a commercial law of the United States distinct from and independent of the law of the states. Whence came it and how was it adopted? Was it the common law of England or the civil law of continental Europe? Was it a law appropriated by the nation upon the adoption of the constitution? It must, then, be universal in its application throughout the nation, overriding all state laws upon the subject and all right of the states to legislate. We know that most of the states are governed by the common law of England as modified and adapted to the peculiar circumstances and conditions of each, and that one state at least is governed by the civil law. And we know, moreover, that the commercial law existing in these various states, while alike with regard to underlying principles, is widely different in many essential respects. There is no common law of the United States, except, possibly, as the common law of England has been adopted with reference to the construction of powers granted to the federal union."

The only case which we have been able to discover where there has been a holding that there is a general common law applicable to interstate shipments, is the case of Murray vs. Northwestern Ry. Co. (62 Fed. Rep., 24), in which the same question which was presented to Judge GROSSCUP was presented to Judge SHIRAS, who held that an action could be maintained against a carrier for the recovery of excessive

charges collected for interstate shipments made prior to the passage of the interstate commerce act. His conclusion appears at page 42 as follows :

" The transaction out of which the present controversy arises pertain to interstate commerce. The defendant company when engaged in transporting grain and cattle of plaintiff from Iowa to Chicago, Ill., was acting as a common carrier of property, and assumed all the duties and obligations pertaining to that occupation. In determining the obligations assumed by a common carrier engaged in interstate commerce, the court has a right to apply the rules of the common law unless the same have been changed by competent legislative action ; and, therefore, in the present case, all shipments made before the adoption of the interstate commerce act are governed by the common law, and those made since the adoption of that act by the common law as modified by that act."

II.

If there is such a Federal or General Common law, has it been violated by the Telegraph Company in this particular instance ?

We come now to consider, however, the question in another aspect ; and that is, if we are wrong upon the proposition hitherto argued, and there is a federal common law which does govern the relation of the parties to this cause, was there any evidence of discrimination such as would entitle the plaintiff to the verdict which it obtained, and the judgment entered thereon.

The plaintiff was the publisher of an afternoon newspaper, and required for the purposes of that paper that

the Associated Press dispatches which he was to receive under the arrangement with the Associated Press, with the sole right to publish them in an afternoon newspaper in Lincoln, should be transmitted to him not later than four o'clock in the afternoon of the date of publication. He did make the arrangement with the Associated Press for the right of publication, or, as the Supreme Court of Nebraska say, they sold the dispatches which would enable him, to make the arrangement with the Telegraph Company for their transmission. Accepting that version of the matter for the present, he made his arrangement with the Telegraph Company for the transmission of those dispatches in such a way that they would be available to him for publication in his evening paper. To do this required on the part of the Telegraph Company an increase in its force by adding an additional operator, and the increase of its facilities from Omaha to Lincoln by the stringing of another wire, all of which was done primarily for plaintiff's benefit. The rate for this service thus to be rendered to the plaintiff was named, and it is to be carefully noted that there is not a word in the petition to the effect that the rate named for the services was an unreasonable rate for the services rendered (Record, pp. 4, 5, 6). It is alleged to be excessive and unjust by way of comparison with another rate named to the "Daily State Journal"; but that is the extent of the averment in that regard.

The testimony likewise fails to disclose that, as compared with the rate charged by the telegraph company to other evening papers receiving a like report, the rate is excessive or unreasonable; for the testimony upon that subject supplied by Mr. Horton on behalf

of the defendant and entirely uncontradicted is not only that the rate named to the "Lincoln Call" was reasonable and not excessive, but he also furnishes facts showing that the rates paid by other evening papers for the day report was as much if not more than the rates paid by the "Lincoln Call." Thus he says (Record, p. 93):

Q. I will ask you, Mr. Horton, whether or not $75 a month for the delivery of the Associated Press report, afternoon report to the "Lincoln Call," from 1887 to 1891, for from fourteen to fifteen hundred words, was an excessive rate? A. It was not.

Q. Is there any other afternoon paper in the United States, within a like distance from Chicago, receiving that report, or did it receive that report during that time for any less than $75 a month over the Western Union wires, if you know? A. Not to my knowledge.

And further at page 94:

Q. You give me a list of papers—I mean give me the list of charges made to other papers? A. The rates for telegraph tolls—I have a list of the charges made to other papers, the list of telegraph tolls. I fixed them myself.

Q. What towns did these include? A. Well, there is one at Durango, Colorado.

Q. What others? A. There was at that time one at Albuquerque, New Mexico, El Paso, Texas, Colorado Springs, Colorado.

Q. Well, do you know what rates they were paying the Western Union for this afternoon report? A. I do.

Q. I will ask you, Mr. Horton, if the convenience for the transmission and delivery of reports there were any different than they are here? A. I do not think they were any more favorable than here.

Q. Were they less favorable than here? A. The report was transmitted from Denver, and in some cases was less favorable; the tolls were greater; but we had a greater amount of wire.

Q. Then I will ask you what these rates were?

By Mr. Stewart: Was it as large a circuit as here—take in as many points? A. The day circuit, at that

time, I think, took in more points—no, probably about the same. Every once in a while a city would drop out.

By the COURT: Did these reports come from Chicago?

A. Sent from Chicago to Denver and there re-edited and practically a new report made of them. El Paso was the farthest point served from Denver. They paid us $60 a week for the day and night report. Albuquerque paid us $30. Colorado Springs paid us $20 a week. That was the nearest point to Denver. That has been discontinued since. There was a number of towns in Kansas took the same like report. Kansas City got practically the same report and our telegraph tolls there I can't remember just now, but none was less than $75, charged to the Association, and some was $85, and $96 at Emporia, and I think at Wellington, Salina and Atchison. We served them all, I think.

A. Where from? A. Kansas City.

Q. I will ask you again what, if any, was the difference in facilities for supplying the towns you have mentioned over the Colorado District and the town from Kansas City and Lincoln here. A. At what time?

Q. From 1887 to 1891. A. Well, we never attempted to start the service and would not make any figures until we had the facilities to start it and handle it properly; so the facilities had to be complete wherever we delivered the report. That is one reason why we did not send it here when Calhoun first wanted it.

Q. Was there any difference in the cost to the company between supplying these points from Denver and Kansas City and this report at Lincoln? A. Practically none. There might have been a little difference in the western circuit—might have been a little more there.

Q. Since this suit arose between the old Call and the Western Union Telegraph Company, I will ask you if the direct contract between the new Call Publishing Company and the Western Union has been abrogated? A. There has been a change, yes, sir.

Q. To whom now does the Western Union look for its pay? A. To the Northwestern Associated Press.

Q. Do you know what the present Call Company has to pay to the Associated Press for the same services those gentlemen were getting? A. Yes, sir.

Q. How much was it? A. One hundred and eight dollars a month; that includes everything. It amounts

to that. Twenty-five dollars a week amounts to about $108 a month.

Q. It is the same afternoon report, under the same franchise that Mr. Bushnell and Mr. Cox had with the old concern. A. It is the same report; yes, sir.

Q. That is, from the same Association. A. Same association and report; yes, sir. Well, I don't know, either. I beg your pardon; I think it is the Associated Press now.

There is no averment in the pleadings, nor any attempt in the case by any evidence anywhere to show that the rates paid by these afternoon papers thus shown to be substantially the same as to this plaintiff, was an unreasonable, excessive, or unjust rate for the services rendered.

An attempt was made to set up in the petition a standard of comparison with the rates to the "Daily Journal," as follows;

"4. That during all said period the defendant wrongfully and unjustly discriminated in favor of the said State Journal Company as against this plaintiff and gave to the State Journal Company an undue advantage in this, that while the defendant demanded, charged, and collected of and from the plaintiff for the services aforesaid $75 per month for such despatches, amounting to fifteen hundred words or less daily, or at the rate of not less than $5 per hundred words daily per month, it charged and collected from the said "State Journal" for the same, like, and contemporaneous services only the sum of $1.50 per hundred words daily per month", (Record p. 5).

On turning to the testimony we find this allegation of the petition not only not sustained, but directly contradicted. So far from the services being the same, like and contemporaneous, the facts, are as we have already stated them respecting the transmission of this afternoon report, that it was transmitted between 11 and 4 o'clock, when the wires of the Telegraph Com-

pany were crowded with other business (See testimony of Bushnell, p. 27; testimony of Syford, pp. 42, 47, 54, 55; testimony of Carlton, pp. 71, 72, 74, 84, 85; testimony of Horton, p. 82; and testimony of Hathaway, p. 110).

So far from the report to the "State Journal" being the same, like, and contemporaneous service," all the testimony of the plaintiff, as well as the testimony of the defendant, agreed upon the fact that the service to the "Daily State Journal" was a service at night, and the report transmitted was continuously transmitted from 7 o'clock or thereabouts in the evening up until, perhaps, 3.30 in the morning. The only foundation for the suggestion that there was a contemporaneous transmission to the "Journal" is found in the fact that, prior to the time when the "Call" made its arrangements for the transmission in time for the publication of the afternoon paper, the "Journal" had been receiving from the Associated Press, under a franchise for a morning paper, a night report, and the day service was transmitted to it, to be used, so far as it saw fit, for its paper the following morning. This was so far continued that when the arrangement was made for the transmission of the 1400-word report for the "State Democrat," that the operator made a carbon copy—that is, at the same writing at which he received a report for the "State Democrat," or later for the "Daily Call," he wrote out two copies and delivered the duplicate carbon copy at some time in the afternoon or evening to the "State Journal," which sometimes used it and sometimes did not use it (Testimony of Bushnell, p. 40). In making the comparison of the volume of words received by the two papers, therefore, this manifold copy of the afternoon report

thus made and handed to the "Journal," and which it might use or not, as circumstances dictated, is included in the number of words alleged to have been transmitted by the Western Union to the "Journal," and made the basis of the comparison upon which the alleged excess is sought to be recovered (Testimony, p. 41).

It further appears that this night report was transmitted in a continuous stream; that the wires were so far relieved from the pressure of other business during the night and the report was so arranged and edited at Chicago that a single operator was continuously employed from the time the report started until it was finished. Whereas, the operator who was employed to take the press report in the day time was practically unavailable for other work, because the press report came along at irregular intervals (Testimony of Syford, p. 45; Testimony of Carlton, 74, 75; Testimony of Hutchison, p. 103).

In the testimony two other alleged tests for the purpose of showing discrimination and excessive charge to the Call Publishing Co. were presented by the Call Publishing Co. over the objection of the Telegraph Company and subject to its exception.

One was the difference in the telegraph company's night and day rate for commercial messages—that is, ordinary single messages—which the testimony shows averaged considerably less than 10 words each (Testimony of Syford, p. 48).

The other basis of comparison was the alleged difference between day and night rates on "special press messages"—that is, not messages sent as the matter sent from Chicago was sent—to many newspapers on a circuit simultaneously, but special messages collected and sent direct to the particular newspaper desiring

it, corresponding in that respect to a commercial message, although usually containing a greater number of words. The day and night rate upon both of these classes of messages was shown, and it was claimed that it demonstrated that inasmuch as the day rate thereon was not in any instance more than twice the night rate, that this clearly proved that the rate charged to the Call Publishing Company for its service was too great because it was much more than double the rate charged to the "Journal," considering the number of words transmitted (See testimony of Bushnell, pp. 63, 64, 65; Testimony of Seacrest, p. 67).

But the question which we now present is: DO ALL THESE FACTS, GIVING THEM THEIR FULL FORCE AND WEIGHT, SHOW UNJUST DISCRIMINATION IN FAVOR OF THE "STATE JOURNAL" AND AGAINST THE PLAINTIFF?

Under the principles of the common law we insist that these services are so different in kind, quality and character that no basis of comparison is afforded by either as to the rates of the other. In the case of the afternoon report to the plaintiff, the Call Publishing Company, it was a report which required a practically continuous service of an operator for as many hours, under the testimony, as the night report required. It was pushed in upon the wires at a time when those wires, under all the testimony in the case, were overburdened with commercial business, much more profitable for the telegraph company to handle than press matter. The night report was received at a time when the facilities were otherwise comparatively idle. It is true that the operator was continuously employed on the night report for about the same number of hours as the operator in the daytime; his pay was substantially

the same. In that respect the principal item of cost of transmission of the transmission of the reports did not materially differ, so far as this particular place was concerned. So far as the number of words was concerned, the telegraph company was doing a wholesale business instead of a retail.

It is evident that the comparative rates charged for commercial messages by day and by night did not afford a fair basis of comparison, for it was an entirely different class of service. So likewise with the special press messages; that service differed in all its essentials, being largely similar to the handling of commercial messages or single messages. It is also to be remembered that the circuits over which the Associated Press reports are sent by day and by night differ very materially; a circuit serving day papers, or those taking the night report for a morning publication, comprehends many more papers for which the report is received than a circuit taking a day report for an afternoon publication. This has to be taken into account in fixing the price for the afternoon paper.

All these considerations very strongly militate against the underlying principle contained in the instructions to the jury given by the Court, upon which the jury proceeded to find the verdict in this case, viz., that the word-rate furnishes a legitimate basis of comparison between entirely different classes of service. The testimony in this case, we think, clearly establishes the proposition that the mere fact that a certain price per word or per hundred words is charged in one case, and a very much less price in another case does not in any way tend to establish that the one is unreasonable, or that there is any discrimination. In fact, nothing would be more mislead-

ing than to undertake to classify the different kinds of services which the Telegraph Company renders and consider the rate purely upon the word basis.

A slight analysis of the testimony in this regard relating to the different classes of service will bring this out in a very clear light. On commercial messages the day rates between Chicago and Omaha at one time were 60 cents for ten words or less, with a charge of four cents for each extra word. At the time of the trial the day rate on such messages between Lincoln and Chicago was 40 cents, with a charge of three cents on each extra word. This is at an average of four or five cents a word for such messages. The lowest charge for such messages for shorter distances was from 25 to 30 cents for messages of ten words or less, with a charge of two cents for each extra word; that is to say, the minimum charge per word for commercial messages was 2½ to 3 cents and an average charge was one and a half to two times that amount (testimony of Syford, pp. 48, 49).

For special press messages, the day rate was one cent per word and the night rate six words for a cent. (Testimony of Bushnell, pp. 64, 65.) For the press reports the day rates were six words for a cent. Here is a great difference between the charge of 2½ to 5 cents a word to the general public for commercial messages, and one-sixth of a cent per word to the complainant in this case. These rates show a charge to the general public of from twenty-five to thirty times as much as the rate to the Call Publishing Company in this case.

The testimony of Mr. Syford, the plaintiff's witness, tends to an explanation of the difference. He testifies that a good average sending for an operator is about thirty words per minute. The sending of a ten-word

message would take about twenty seconds, for which the Telegraph Company received 40 cents,or four cents per word, if the message were from Chicago to Lincoln. For the same price the " Lincoln Call " would receive 240 words. But the commercial message must be prepared in the office of the Telegraph Company, and the company must furnish the necessary paper, pens, and ink, each being an item of expense. It must then be handled over a counter by a clerk, whose duty embraces the reading of the message, in order to correct any illegibility in the name and address of the person to whom the message is addressed and the name of the sender. He must note on the margin the time of the receipt, the number of words, and the tariff charge; and receive payment for the message, and then forward it to the operator who is to send the message. The operator has to observe most of the items noted on the message by the clerk, call up the operator at the other end of the line, wait until his call is answered, and then the message must be sent. The operator receiving the message takes the different items which we have noticed and copies them. After the message is fully transcribed by the operator with copying ink, a letter-press copy must be made of it, after which it is put into an addressed envelope, and turned over to a messenger whose duty it is to find the addressee. If the messenger is unable to find him, a message of inquiry is sent from the receiving office back to the sending office, and it is then the duty of the latter office to look up the sender of the message as speedily as possible and deliver him a copy of the inquiry, and receive from him a more definite address, which has to be immediately wired back to the office of destination of the message,

whereupon the message is again placed in the hands of the messenger for a new attempt to find its address. Coupled with all this are the risks arising from the fact that the large bulk of these messages concern commercial transactions, and a failure to send correctly is liable to involve the company in claims for damages and litigation. All these and many other items of expense have to be taken into the account in fixing the price for the transmission of a message of this character.

As against this special service and the care which has to be taken to avoid loss, the newspaper day specials, for which a charge of one cent a word is made, are sent during the daytime from various points where the newspaper has correspondents. They relate usually to items of general news. A mistake or change of a word does not involve liability for loss and damage. They do not require the same calculation, the same memorandum by the clerk. They involve practically only the counting of the words and a noting on the message of these facts. The party to whom such messages are addressed is usually some well known newspaper. There is no delay or difficulty in the delivery. The whole element of risk and insurance of the accuracy of the contents of the message is eliminated. In addition must be considered that they average many more words than the commercial message. It is evident that they can be sent very much cheaper per word than the ordinary commercial message.

In the case of the press reports again, there are the different elements to which we have called attention *(ante* pp. 6–8, 41–43*)*. In the case of the afternoon press report, it has to be transmitted at the time when the Telegraph Company's facilities are more or less crowded

with commercial business, but it differs very materially from the handling of the ordinary commercial message. It is a report which has to be edited by the Associated Press; it is then filed at one of the offices of the Telegraph Company, say Chicago, where the words are counted; but it is transmitted upon a circuit, like that, for instance, upon which the day report was sent to the "Lincoln Call"—that is, upon a circuit which included a number of other cities receiving this same day report on the line of the Telegraph Company, the number of these points being determined by the number of papers within reach of Chicago to which this day report could be transmitted simultaneously. It is evident that where the report consisted of a large number of words, many times that of the ordinary commercial message, and where it was transmitted by one operator to a large number of places simultaneously, the rate per word for each of those places could be much below that at which it would be possible to send without loss an ordinary commercial message.

The night report simply carries the reduction still further, because while the day report, as shown in this case, amounted to a maximum of 1,500 words under the arrangement, the night report consisted of 5,000 to 7,000 words. It was sent to a larger number of newspapers upon the same circuit, because the morning papers outnumbered in the same territory the evening papers, and the night report is for morning publication. And from this fact alone it can readily be seen that it is quite possible that the aggregate compensation to the Telegraph Company from serving this night report, even at its lower word rate, might be very much greater than that realized by serving the day report at its higher word rate.

Further, this night report, as the testimony shows, was sent in a continuous stream, requiring one of the best operators to receive it; but it occupied his entire time during the period over which it was thus sent without interruption. In this respect it differed from the day report, which, while it required that an operator should always be ready to receive it between certain hours, still his time was not fully occupied for the reason that the report was not so edited that it could all be sent when the operator was first called to receive it; but it was transmitted in installments. It is evident that, to send a report of this class at night, when the facilities, in which the Telegraph Company has its capital invested, would otherwise be largely idle, the Telegraph Company could afford to do it at a very much less word rate than by day, and that compared with the day service the relative word rate would be very different from the ratio existing between the rate for transmission of a commercial message or a newspaper special message by day, and the rate for transmitting a similar message by night.

Nothwithstanding these very marked differences in the conditions under which these different classes of messages were sent, this case was sent to the jury by the court, under instructions which practically assumed that the conditions surrounding the Telegraph Company in transmitting night press dispatches and day press dispatches in nowise differed from the relative conditions affecting the Telegraph Company in sending commercial day messages and commercial night messages, or newspaper day specials and newspaper night specials.

We may get some light upon the proper rule upon this subject from decisions relating to common carriers,

and their obligations, for certainly the obligations of the Telegraph Company to the public are no more stringent than those of a common carrier.

In Hays & Co. vs. Pennsylvania Company (12 Fed. Rep., 309) Circuit Judge BAXTER had occasion to consider the question of what constituted discrimination by a railroad company in its rates for freight. He says (p. 311):

"It is enough for present purposes to say that the defendant has no right to make unreasonable and unjust discriminations. But what are such discriminations? No rule can be formulated with sufficient flexibility to apply to every case that might arise. It may, however, be said that it is only when the discrimination occurs to the undue advantage of one man, in consequence of some injustice inflicted upon another, that the law intervenes for the protection of the latter. For instance, the carrying of one person who is unable to pay fare free is no injustice to other passengers who may be required to pay the reasonable and regular rates fixed by the company. * * * Freight carried over long distances may also be carried at a reasonably less rate per mile than freight transported for shorter distances, simply because it costs less to perform the service. For the same reason passengers may be divided into different classes, and the price regulated in accordance with the accommodation furnished to each, because it costs less to carry an emigrant with the accommodations furnished to that class than it does to carry an occupant of a palace car."

This Court in Interstate Commerce Commission vs. Baltimore and Ohio R. R. Co. (145 U. S., 263), sustained a rate of two cents a mile to parties of ten or more as against three cents per mile to the ordinary passenger, the court holding that such a difference was not in any sense an unjust or unreasonable discrimination, even under the interstate commerce act.

Justice BROWN says, page 279:

"Prior to the enactment of the Act of February 4, 1887, to regulate commerce, commonly known as the

Interstate Commerce Act (24 Stat., 379, c. 104), railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service (Fitchburg Railroad Co. vs. Gage, 12 Gray, 363; Baxendale vs. Eastern Counties Railway Co., 4 C. B. [N. S.], 63; Great Western Railway Co. vs. Sutton, L. R., 4 H. L., 226, 237; *Ex Parte* Benson, 18 South Car., 38; Johnson vs. Pensacola Railway Co., 16 Florida, 623), though the weight of authority in this country was in favor of an equality of charge to all persons for similar services."

In the same case at circuit (43 Fed. Rep., 44), Justice JACKSON says:

"The act to regulate commerce does not undertake to deal with the subject of rates for the transportation service or with the business considerations which may influence common carriers in so adjusting them as fairly to increase their revenue, while paying due regard to the convenience of the public, any further than to declare the general principle that such rates shall be reasonable and just, shall be free from unjust discrimination, and shall confer no undue or unreasonable preference or advantage, nor impose any undue or unreasonable prejudice or disadvantage. Subject to these conditions and limitations, the act does not and was not intended to restrict the common-law right and power of common carriers to make special contracts, or adjust their rates with reference to existing wants and circumstances, so as to promote their own interests, while affording all proper and reasonable facilities and conveniences to the public. Subject to the above conditions, the act intended to leave the adjustment of rates as absolutely and completely in the discretion of the carrier as it existed at common law, which never questioned or denied to common carriers the right to give or make low rates, based on increased quantity or amount of service. No case arising under the English railway acts of 1845, 1854 and 1873, so far

as we have been able to find after careful examination, has ever called in question or impeached the right of carriers to fix rates and issue tickets based upon the consideration of the amount or volume of the traffic, nor disputed the reasonableness and sound business propriety of railroad companies granting reduced rates to parties traveling often or furnishing increased traffic in the way of numbers. On the contrary, their right to regulate and adjust their rates is universally recognized."

Upon this question of the rule at common law, Story on Bailments, section 508, 8th Edition, states the rule to be that a common carrier of goods is not under any obligation to treat all customers equally. He is bound to accept and carry freight on being paid a reasonable compensation; but the fact that he charges less for one than for another is only evidence to show that a particular charge is unreasonable, nothing more. There is nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate or even gratis.

This is agreeable to the language used by CROMPTON, J., in Garten vs. B. & E. R. R. Co., 1 B. & S., 112:

"The charging another party too little is not charging you too much."

And all the authorities hold that

"In determining whether a company has given undue preference to a particular person, the court may look to the interests of the company."

Ransome vs. Eastern Counties Ry., 1 C. B. (N. S.), 437.

In Baxendale vs. E. C. Ry. Co., 4 C. B. (N. S.), 78, it is said by BYLES, J.:

"I know no common-law reason why a carrier may not charge less than what is reasonable to one person, or even carry for him free of all charge."

And in Great Western Railway Co. vs. Sutton, L. R., 4 H. L., 226, it is said by BLACKBURN, J.:

"At common law a person holding himself out as a common carrier of goods was not under any obligation to treat all customers equally. The obligation which the common law imposed upon him was to accept and carry all goods delivered to him for carriage according to his profession (unless he had some reasonable excuse for not doing so) on being paid a reasonable compensation for so doing; and, if the carrier refused to accept such goods, an action lay against him for refusing; and, if the customer, in order to induce the carrier to perform his duty, paid, *under protest*, a larger sum than was reasonable, he might recover back the surplus beyond what the carrier was entitled to receive, in an action for money had and received, as being money extorted from him. But the fact that the carrier charged others less, though it was evidence to show that the charge was unreasonable, was no more than evidence tending that way. There was nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even gratis. All that the law required was that he should not charge any more than was reasonable."

See to the same effect Thompson on Carriers, Sec. 297 *et seq.*, and note, Sec. 302; Smith's Leading Cases, Vol. 1, pp. 381-448; 62 N. Y., 171,-179; Schouler on Carriers, pp. 355, 356.

Certainly at common law the obligations of a common carrier were not as stringent in respect to making difference in rates to patrons as they are in the interstate commerce law. Justice BROWN very properly observes, in the party rate case above quoted from, that a rate may be entirely reasonable under section 1 of the Act, and yet it may be an unjust discrimination under the subsequent sections of that act. The subsequent sections apply stringent provisions to secure equality of rates, which did not obtain at common law. Under the principle of the party rate case, we insist that the dif-

ference between the charge of the Telegraph Company to the Call Publishing Company and the charge of the State Journal under the testimony disclosed in this regard was entirely proper, and if the Telegraph Company had been subject to the provisions of that act, or its action was to be tested by the stringent provisions of the different sections of that act, that no case under the interstate commerce act could have been made against it upon the facts disclosed in this record. If this is true, clearly there was no discrimination under any rule or principle of the common law.

In addition to the foregoing considerations respecting the absence of discrimination, and that the word rate furnishes no basis of comparison between different classes of service, it is to be observed that it was impossible to apportion any part of the $125 paid by the State Journal to the day rate, and another portion to the night rate. The $125 paid for both day and night rate was for an entire service as a unit, and, for the reasons which have already been given, there was such a difference in the conditions that the word rate furnished absolutely no test of the propriety of the charge for the services.

Moreover, it was insisted by the Telegraph Company upon the trial, and is now insisted in its behalf that a portion of the consideration to the Call Publishing Company for the $75 paid to the Telegraph Company was the exclusive privilege of receiving the Associated Press reports and publish them in its evening paper. It is true that a certain price for the privilege was paid to the Associated Press. But the memorandum of agreement between the Western Union Telegraph Company and the Northwestern Associated Press shows very clearly that these two par-

ties were closely inter-related in the matter of transmission of newspaper dispatches to points in this territory, the Associated Press very carefully stipulating not to interfere with the commercial news and market reports or quotations which the Telegraph Company was engaged in disseminating, the Telegraph Company on its part agreeing to transmit news only for the Northwestern Associated Press.

It further appears from the correspondence (Record, pp. 121, 122) that Calhoun, the proprietor of the "State Democrat," who originally obtained the franchise (Exhibit "A," p. 117) from the Associated Press, was informed by the Associated Press manager that, prior to any arrangement being made with him for the news, he must arrange with the Telegraph Company for the cost of transmission of the report and make an arrangement for that transmission, when they would then take the matter into consideration.

It further appears that when the rate was made, on the 6th of June, 1887, for the transmission of the Northwestern Association's 1,400-word report to Lincoln, before the service was begun there was required an arrangement, for the use of the report, with the Association, and the order for the service of the report filed with the Telegraph Company came not from Calhoun, the publisher of the "Democrat," but from the Association. This being so, we submit that the point made by the Telegraph Company, upon the trial of the cause in the Supreme Court and upon the motion for rehearing (Record, p. 132), that the use of the service of the Associated Press was a part of the consideration which the Call Publishing Company received for the $75 paid, was well taken. It was improper, in view of this fact, to attempt to compare

the $75 paid by the Call Company with the $125 paid by the Journal Company.

III.

The Supreme Court of Nebraska ought to have reversed the Judgment of the trial Court because of its refusal to charge as requested by the telegraph Company, and for errors in the charge given to the Jury.

If, however, we are wrong in the first and second propositions which we have urged to this court, still it was the duty of the Supreme Court of Nebraska to have reversed the judgment in this case in view of the failure of the court to give to the jury instructions asked by the defendant (Record, pp. 17, 18) and refused by the court. And, also, in view of the instructions which were asked by the plaintiff, and given by the court (Record, p. 16).

If it be true, as is held by the Supreme Court of Nebraska, in the opinion already quoted from, that,

"in the absence of national legislation, the principles of the common law or general jurisprudence of the State of the action are applicable and may be asserted and enforced,"

still we insist that, in applying the principles of the State law to interstate services, the Supreme Court of Nebraska must apply those common-law principles correctly, else the interstate service is subjected to a burden by the State which deprives the person rendering the interstate service of rights and

immunities under the common law, to which he is entitled under the Federal Constitution. In other words, the State Court must rightly interpret and apply the common law as applicable to such interstate services. We insist that, under the rules of the common law, the charge to the jury asked for in behalf of the defendant below, that, under the law and evidence in this case, there was no right of recovery, should have been given; and, also, the charge that there was a difference between the classes of service rendered the "Lincoln State Journal" and to the "Call Publishing Company," and that no verdict could be rendered upon any comparison of the respective services rendered to these companies. We also insist that the instruction requested by the plaintiff and given by the Court, that the payments made by the "Call Publishing Company" to the telegraph company could not be deemed voluntary payments, and that no protest was required, is not a correct exposition of the law upon that subject.

It should be noted that there is no charge in the petition in this case, and no attempt in the testimony to establish the fact that the rate paid by the "Call Publishing Company" was an unreasonable one for the services rendered. On the contrary, as we have already pointed out, the defendant offered testimony which stood uncontradicted at the close of the trial, that the sum paid by the "Call Publishing Company" was intrinsically a reasonable one. What the petition does charge is that there was a wrongful and unjust discrimination in favor of the "State Journal Company" and against the "Call Publishing Company," whereby an undue advantage accrued to the "State Journal Company," in that the rate per hundred words daily per month to the Journal was $1.50 and the rate per hun-

dred words daily per month to the Call Publishing Company was $5, and to the extent of the excess of $3.50,

"it was an unjust and wrongful discrimination against the plaintiff and in favor of the State Journal Company" (Record, p. 6).

It is clear from the testimony that the services were not the same, like, and contemporaneous services, that they differed materially in the time of rendition, and character, cost and value of the services rendered, and that these facts justified a difference in rates. But even assuming for the purposes of this argument that there was a difference in rate for the same services, then the charge in the petition only amounts to an allegation that the telegraph company charged the Call Publishing Company a reasonable rate and, charged the Journal Company too little for its services; and the question is whether, that being so, an action lay at common law to recover back the difference between the higher and the lower rate under these circumstances. As we have already seen, according to the language of CROMPTON, J., in Garten vs. B. & C. R. R. Co., "charging another party too little is not charging you too much." The other authorities which are cited *(ante,* pp. 52, 53*)* from the English courts are to the same effect, that there may be a charge too low for one party, but that does not prove that the rate charged to a particular person is an unreasonable rate. The rate may still be reasonable as to him, that is reasonable compensation for the services rendered.

The Court of Appeals of New York, in Lough vs. Onterbridge (143 N. Y., 271), after a full consideration, held that

"while a common carrier is bound to convey and deliver goods for a reasonable compensation, and may not where the circumstances and conditions are the same unreasonably or unjustly discriminate in favor of one against another, it may make a discount from its reasonable general rates in favor of a particular customer or class of customers in isolated cases for special reasons and upon special conditions."

In this case a steamship company maintained a line of vessels between New York and Barbadoes and the Windward Islands. Its regular standard rate for freight prior to December, 1891, from New York to Barbadoes, was 50 cents per barrel, which was the unit of measurement, and the tariff of charges was adjusted for goods shipped in other forms and packages accordingly. In December, 1891, it reduced its regular rate from 50 to 40 cents per barrel. A tramp steamer began to take cargo at that time from New York to Barbadoes and made irregular trips. It was a competitor for a part of the business of the defendant's vessels. They thereupon adopted the plan of offering special reduced rates of 25 cents per barrel for freight to all merchants who would agree to ship exclusively by their line during the week that the tramp steamer was engaged in obtaining freight and taking on cargo; at other times the freight remained at 40 cents.

The action in the case was brought by a shipper who tendered freight while the tramp steamer was in New York and insisted on the right to the rate of 25 cents per barrel, but declined to stipulate to ship all his freight by this line of steamers. The question arose as to the duty of the defendant. It appeared from the facts of the case further that 40 cents was a reasonable rate; 25 cents was not profitable. Giving the opinion on the subject, O'BRIEN, J., says (p. 279):

" There can be no doubt that at common law a common carrier undertook generally and not as a casual occupation to convey and deliver goods for a reasonable compensation as a business, with or without a special agreement and for all people indiscriminately, and, in the absence of a special agreement, he was bound to treat all alike in the sense that he was not permitted to charge any one an excessive profit for the services; and he has no right in any case, while engaged in this public employment, to exact from any one anything beyond what under the circumstances is reasonable and just (2 Kent's Com. [13th Ed.], 598; Story on Bailments, Secs. 495, 508; 2 Parsons on Cont., 175; Killmer vs. N. Y. C. & H. R. R. R. Co., 100 N. Y., 395; Root vs. L. I. R. R. Co., 114 *id.*, 300). It may also be conceded that the carrier cannot unreasonably or unjustly discriminate in favor of one or against another where the circumstances and conditions are the same. The question in this case is whether the defendants, upon the undisputed facts contained in the record, have discharged these obligations to the plaintiffs. There was no refusal to carry for a reasonable compensation. On the contrary, the defendants offered to transport the goods for the 40 cents rate, and we are concluded by the finding as to the reasonable nature of that charge. The defendants even offered to carry them at the unprofitable rate of 25 cents, providing the plaintiffs would comply with the same conditions upon which the goods of any other person were carried at that rate. What is reasonable and just in a common carrier in a given case is a complex question into which enter many elements for consideration. The questions of time, place, distance, facilities, quantity and character of the goods, and many other matters, must be considered. The carrier can afford to carry ten thousand tons of coal or other property to a given place for less compensation per ton than he could carry fifty, and where the business is of great magnitude a rebate from the standard rate might be just and reasonable, while it could not fairly be granted to another who desired to have a trifling amount of goods carried to the same point. So long as the regular standard rates maintained by the carrier and offered to all are reasonable one shipper cannot complain because his neighbor, by reason of special circumstances and conditions, can make it an object for the carrier to give him reduced rates. In this case the finding implies

that the defendants at certain times carried goods at a loss, upon the condition that the shippers gave them all of their business. * * * If the general rates are reasonable, a deviation from the standard by the carrier in favor of particular customers, for special reasons not applicable to the whole public, does not furnish to parties not similarly situated any just ground for complaint. When the conditions and circumstances are identical, the charges to all shippers for the same service must be equal. These principles are well settled, and whatever may be found to the contrary in the cases cited by the learned counsel for the plaintiff originated in the application of statutory regulations in other States and countries (Fitchburg R. R. Co. vs. Gage, 12 Gray, 393; Sargent vs. B. & L. R. Corp., 115 Mass., 422; Mogul S. S. Co. vs. McGregor, Gow & Co., L. R. [21 Q. B. Div.], 544; affd., 23 Q. B. Div., 598, and by H. L. [17 Appeal Cases], 25; Evershed vs. L. & N. W. Ry. Co., L. R. [3 Q. B. Div.], 135; Baxendale vs. E. Co. R. Co., 4 C. B. [N. S.], 78; Branley vs. S. E. R. Co., 12 *id.*, 74)."

To the same effect is the decision of WALLACE J., in Menacho vs. Ward (27 Fed. Rep., 529), his language being as follows:

"Unquestionably a common carrier is always entitled to a reasonable compensation for his services. Hence, it follows that he is not required to treat all those who patronize him with absolute equality. It is his privilege to charge less than fair compensation to one person or to a class of persons, and others cannot justly complain so long as he carries on reasonable terms for them. Respecting preferences in rates of compensation, his obligation is to charge no more than a fair return in each particular transaction, and except as thus restricted he is free to discriminate at pleasure. This is the equal justice to all which the law exacts from the common carrier in his relations with the public."

This is the common law rule upon the subject. The uncontradictd testimony in this case on the part of the defendant was that the rate of $75 per month to the Call Publishing Company was reasonable, and

there being no allegation in the petition of the plaintiff and no testimony to the contrary of this in the case, the charge asked by the defendant and refused by the court that the plaintiff was not entitled to recover should have been given. The requests to charge that there was no unjust discrimination in favor of the "State Journal" and against the "Call Publishing Company" should also have been given.

The mere fact that there was a difference in rates wholly independent of the difference in the quality of the service, so long as the rates at which the dispatches were transmitted for the Call Publishing Company were reasonable, gave that company no cause of complaint, even although the telegraph company saw fit to render similar services to the State Journal for even less than cost. The discrimination could only be an unjust one upon proof that the rate to the Call Publishing Company was an excessive and unreasonable one. No such proof can be found in this record, and the submission to the jury to guess at what would be a reasonable rate on the part of the carrier was conferring upon the jury the prerogative of fixing rates for the telegraph company for sending press matter, based upon some theory or surmise that they might form from the difference between day and night rates for commercial and press messages, which were wholly different in character and kind.

Voluntary Payment.

In addition to this, the jury should have been instructed that, under the facts of this case, there could be no recovery from the telegraph company by the Call Publishing Company, because there was a continuous series of voluntary payments, without protest, at the rate named by the "Call Publishing Company." Being a voluntary payment there was no duress, and the rule at common law is that a payment of that kind cannot be recovered back. This rule was affirmed by this Court in its opinion in case of Railroad Co. vs. Commissioners, 98 U. S., 541.

WAITE., C. J., at page 543, delivering the opinion, approves the statement in Wabaunsee Co. vs. Walker (8 Kan., 431):

"Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary and cannot be recovered back. And the fact that the party at the time of making the payment files a written protest does not make the payment involuntary."

See, also, Dillon's Municipal Corporations (4th Ed.), Sections 945, 946, 947.

The rule upon the subject as applied to carriers is thus stated in "Hutchinson's Common Carriers," Section 447:

"*The Amount of Compensation for Carriage.* Further than that his charges shall be reasonable, the common law seems to have put no restriction upon the carrier in respect to his demand for compensation, and what is a reasonable charge can, of course, be fixed by no particular rule, but must be determined in every

case, as a question of fact, by the same rules which would apply to other cases of service performed, except that the extraordinary responsibility of the carrier for the safety of the goods must always in such cases be taken into consideration as an element of the service. Compensation for the carriage is, however, generally fixed by the agreement of the parties, or ascertained by the known accustomed rates of the particular business in which he is employed; and, consequently, but few controversies arise as to its amount between the carrier and his employer. If the owner who desires to send his goods should believe his charges to be unreasonable he should tender to the carrier, at the time he offers his goods, what he believes to be a reasonable amount for the service, and upon the carrier's refusal to accept them upon the proposed terms, the owner may bring an action against him for his refusal; or if the price for the carriage is not demanded in advance, the owner may demand the goods after the carriage, tendering what he believes to be a reasonable compensation, and upon the carrier's refusal to accept the tender and deliver the goods, he may sue him for them in trover or replevin; in which, however, he would fail if the issue as to reasonable compensation should be determined in favor of the carrier. Or the consignee or other party entitled to the goods may pay the charges exacted as a condition of their delivery, with an accompanying denial of the right of the carrier to exact it, and may, after thus obtaining his goods, bring his action and recover so much of the payment as has been illegally demanded and paid. Money paid under such circumstances beyond the amount to which the party demanding it is justly entitled, is paid under compulsion. And it is not necessary, to entitle himself to this remedy, that he should have tendered to the carrier the amount which he thought reasonable, or that he should have stated the amount to which, in his opinion, the carrier was entitled, with an offer to pay it. It is enough that he complained of the charge as unreasonable and paid it under protest."

In Killmer vs. N. Y. Central & H. R. R. R. Co. (100 N. Y., 395), there was a suit brought against the railroad company by a milk shipper who had been shipping for

a number of years, and who paid a tariff rate of 60 cents for every 40 gallons of milk carried for a portion of the time, and for another portion of the time covered by the suit, a rate of 45 cents. There was never any agreement between the plaintiff and the railway company as to the rate of freight to be charged or paid beyond what might be implied from a general tariff rate fixed by the railway company known to the shipper and the payment by the shipper for the service at that rate. It was admitted on the trial that the shipper paid this freight daily at the tariff rate without making any objection. The shipments covered a period of thirteen years, and during that period there was no negotiation between the parties as to the rate of freight to be charged, and no complaint or remonstrance on the part of the shipper that the charge was excessive. The complaint based the right to recover, on the ground of extortion, and the extortion consisted in the alleged fact that the railway company had fixed an excessive rate which the shipper paid without objection. Upon this question of the right to recover back under these circumstances, ANDREWS, J., says (p. 402):

"But the common law duty does not preclude special contracts between railroad corporations and shippers regulating the freight charge, and where, as in this case, freight has been carried for a long course of years at the schedule price, the shipper making no objection and no inquiry as to the reasonableness of the charge when it was his interest to object if the charge was unreasonable, he must, we think, be deemed to have assented to the charge as reasonable, and to have voluntarily waived any objection thereto. At least the receipt by the company of the freight at the tariff rate, under such circumstances, has no element of extortion. The company is doubtless better informed than the shipper as to what would be a compensatory

or reasonable charge, but many of the facts which enter into the formation of a judgment on the question are accessible to the shipper, and it would not be in accordance with general principles of justice that he should be permitted to forbear all means of ascertaining the truth, and after the lapse of years for the first time open a question which he did not, at the time of the transaction, regard of sufficient importance to engage his attention.

"We are of opinion that this action cannot be maintained. The express admission that the payments sought to be recovered, were made without objection, renders it unnecessary to consider whether the small part of the claim which accrued after the service of the notice of August 20, 1879, stands in any different position from the rest. All concur."

Keener on *quasi* contracts, page 438, states the rule as to the recovery back of money from a common carrier in this wise:

"On the same principle it is held that a carrier who refuses to receive goods tendered to him unless a sum of money is paid to which he is not entitled, must refund to the plaintiff the over-payment made under such circumstances."

This author refers no case of a right to recover from a carrier where the money has been voluntarily paid, but only where the carrier has either refused to receive goods unless the money was paid, or where the carrier has refused to deliver goods only upon the condition of receiving a payment to which the carrier is not entitled (See *id.*, p. 428).

The court gave an instruction requested by the plaintiff to which defendant excepted (Record, p. 16), that although the plaintiff paid year by year for these services under a contract, yet if he discovered that the amount paid by the State Journal was considerably less, upon such discovery the payment would cease to

be a voluntary payment, and no protest would be required on his part, and that he could bring an action to recover it back. This, we submit, is not the law, and for this erroneous instruction the judgment should have been reversed by the Supreme Court of Nebraska.

Respectfully submitted,

RUSH TAGGART,

Attorney for Plaintiff in Error.

JOHN F. DILLON,

Of Counsel.

No. 117

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

THE WESTERN UNION TELEGRAPH COMPANY, *Plaintiff in Error,* v. THE CALL PUBLISHING COMPANY, *Defendant in Error.*	IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

ARGUMENT AND BRIEF OF DEFENDANT IN ERROR

JOHN M. STEWART,
Solicitor for Defendant in Error.

STATEMENT.

This action was commenced in the District Court of Lancaster County, Nebraska, by the Call Publishing Company, Defendant in Error against the Western Union Telegraph Company, Plaintiff in Error.

The Call Publishing Company was formerly publisher of a daily newspaper, and the basis of its action was a claim

for damages sustained on account of alleged wrongful discrimination against it by plaintiff in error in the matter of charges for telegraphic services.

The petition in substance alleges that the plaintiff in error charged and collected from defendant in error several times as much for telegraphic services as it at the same time charged and collected for like services from the Daily State Journal, a competitor of defendant in error. Plaintiff in error by its answer denied that it had wrongfully discriminated against defendant in error, and alleged the business in question to be inter state commerce, and that plaintiff in error was a government aided telegraph company; that it had filed its acceptance with the Post Master General of the provision of the act of Congress entitled:

"An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes. Approved July 24th, 1866."

It further alleged:

"And that the control of such commerce, and the transmission of such messages is by the constitution and laws of the United States, vested in the Congress of the United States, and that the state of Nebraska, its courts and legislature is and are without authority, power or jurisdiction to regulate or attempt to regulate the same, and that this court is without jurisdiction to weigh, try or determine the matter herein involved."

The trial resulted in a judgment February 13th, 1896, in favor of the defendant in error for the sum of $1,097.66. Motion for a new trial was over-ruled, and the case was taken on error to the Supreme Court of Nebraska by the telegraph company, and on March 8th, 1899, the judgment was affirmed by the Supreme Court, and from such judgment and affirmance the telegraph company now prosecute

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this proceedings in error. No demurrer to the petition was interposed in the District Court, raising either the question of the sufficiency of the allegations of the petition to state a cause of action, or the jurisdiction of the court over the subject matter of the action. Nor does it appear that such court was called on to pass upon such questions in any other way. The petition in error filed in the Supreme Court of Nebraska, contains no assignment relating to the sufficiency of the petition to state a cause of action nor of the want of the jurisdiction of the corut over the subject matter of the action. While it is true the seventh paragraph of the answer pleads want of jurisdiction of the court over the subject matter of the action, it does not appear that the District Court was required by plaintiff in error to rule on this question.

The first assignment of error in the petition filed in the Supreme Court alleges that the Court erred in over-ruling the demurrer ore tenis interposed by the defendant on the trial immediately preceding the introduction of evidence, the ground of said demurrer being that the petition of the plaintiff failed to state a cause of action, but no such demurrer is shown by the record to have been made.

Under the practice obtaining in the Supreme Court of Nebraska, the question of the sufficiency of the petition to state a cause of action may be raised at any time, and in the case at bar this question was raised only, as appears from the record, in the argument of counsel. On this subject. the Supreme Court says in its opinion:

"It is argued that the petition does not state a cause of action. The reasons given for this contention are that the pleading attacked declared upon a contract for inter-state business; that the regulation of such business rests ex-

clusively with Congress; that the statutes of Nebraska by which it is sought to establish rules on the subject, were ineffective; that there is no national law applicable, and no rules of the common law in force, or recognized as national rules, are enforcible within the nation, as an entirety, or within the states composing it, or any one thereof, which in the absence of statutory enactment by congress, might be invoked and be governable."

BRIEF AND ARGUMENT.

I

THE BENEFIT AND IMMUNITY WAS NOT SPECIALLY SET UP AND CLAIMED IN THE STATE SUPREME COURT.

It is alleged in the assignment of error herein that the benefit and immunity now contended for was by plaintiff in error "specially set up and claimed," in the State Supreme Court.

To give this court jurisdiction, by the provision of Section 709 of the Revised Statutes, such an allegation was required. It will be seen that there is no assignment of error in the State Supreme Court specially setting up and claiming any benefit, right, or immunity, under the constitution and law of the United States. The first two assignments of error in the proceedings at bar relate solely to the jurisdiction of the state court over the subject matter of the action, and are based upon the claim that the provisions of the Federal Constitution vesting in congress, the regulation of inter-state commerce, was exclusive of the jurisdiction of the state court.

The third assignment of error is based upon the claim that the state court was without jurisdiction because plaintiff in error was a government agency. No such claims are

anywhere shown to have been made in the state Supreme Court. The only intimation in the record that the laws of the Federal government were even incidentally under consideration in the state supreme court is found in the quotation heretofore made in which the court says: "It is argued that the petition in error does not state a cause of action."

The reason for such argument as shown in the opinion is not that the state court has no jurisdiction over the subject matter of the action as alleged in the answer in the trial court, and in the assignments of error in this court, but that under the facts stated in the petition *there is no rule of law authorizing a recovery in any court, state or federal.*

Briefly stated, the argument of counsel made in the state Supreme Court as to the sufficiency of the petition to state a cause of action is based on two grounds:

1st. The judicial determination of controversies growing out of inter-state commerce cannot be grounded on the principles of the common law.

2nd. Congress has enacted no statute creating a right of action against carriers engaged in inter-state commerce for wrongful discrimination, hence no right of action exists.

In the first place, we urge that even though the claim of immunity be sufficiently explicit, it is not enough to simply set up and make such claim in the argument in the state supreme court. It must appear as part of the record. This court has repeatedly so held.

Gross v. United States Mortgage Co., 108 U. S., 477.
United States v. Taylor, 147 U. S., 695.
Duncan v. Missouri, 152 U. S., 375.
Powell v. Brunswick County, 150 U. S., 433.

Nor is it sufficient to claim that the petition does not state a cause of action.

To meet the requirements of the provisions of Section 709, Revised Statutes, plaintiff in error must have set up and claimed in the state Supreme Court in apt terms, the facts that it was entitled to immunity from suit and judgment in the case at bar because it is a government agency, and also that it is entitled to such immunity under the provisions of the Federal Constitution vesting in congress the exclusive control of inter-state commerce. It failed to do this, and by reason of such failure, we submit that this court is without jurisdiction to review such judgment.

In support of such contention, we cite the following citations and authorities:

In the case of Oxley Stove Co. v. Butler County, 166 U. S., 648, the Court says:

"The words 'specially set up or claimed, in the section imply that if a party in a suit in a state court intends to invoke for the protection of his rights the Constitution of the United States or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare 'especially' that is unmistakably this court is without authority to re-examine the final judgment of the state court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference."

In Maxwell v. Newbold, 18 Howard, 516, it is held that the question whether a writ of error will lie from this court to the Supreme Court of a state, depends on the questions raised and decided in the Supreme Court of the state.

In the last named case it was alleged in the state Supreme Court that the charge of the trial court was against and in conflict with the constitution of the United States.

Chief Justice Taney, in the opinion speaking of this allegation, says:

"It alleges that the charge of the court was against and in conflict with the constitution and laws of the United States. But what right did he claim under the constitution of the United States, which was denied him by the state court. Under what clause of the constitution did he make his claim, and what right did he claim under an act of Congress, and under what act of the wide range of our statutes, did he claim it? The record does not show."

See also to the same effect:

Lawler v. Walker, 14 Howard, 149.

Sayward v. Denney, 158 U. S., 180.

Miller v. Texas, 153 U. S., 535.

Morrison v. Watson, 154 U. S., 111.

Chicago, Etc. Ry. Co. v. Chicago, 164 U. S., 454.

Capital National Bank v. Cadiz Bank, 172 U. S., 425.

Waterpower Co. v. Street Ry. Co , 172 U. S., 488.

II.

THE STATE COURT HAD JURISDICTION OF THE SUBJECT MATTER OF THE ACTION.

We contend that the state court had jurisdiction over the subject matter of the action. It could apply the principles of the common law in granting a remedy for the wrongful discrimination complained of.

The Revised Statutes of the United States, Section 711 provides in what cases the jurisdiction of Federal Courts shall be exclusive. Cases relating to or growing out of contracts for inter-state commerce are not wthin such pro-

visions. It is true that *legislative control* of commerce between the states is vested in congess, but it does not thereby follow that state courts may not hear and determine controversies between their citizens growing out of such business and involving constitutional and federal laws governing the same.

In the case of Plaquemines Fruit Co. v. Hamilton, 170 U. S., 515, the following statement by Alexander Hamilton is quoted by the court with approval:

"The judicial power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litiagtion between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than those of New York may furnish the objects of legal discussion to our courts. When in addition to this, we consider the state governments, and the national government as they truly are in the right of kindred systems and as part of one whole, the inference seems to be conclusive that the state courts would have a concurrent jurisdiction in cases arising under the laws of the Union where it was not expressly prohibited."

Such doctrine has been adopted by this court in numerous cases. See

The Moses Taylor v. Hammons, 4 Wall, 429.

Martin v. Hunter, Lesee, 1 Wheat, 334.

In the case of the Plaquemines Fruit Co. v. Hamilton supra, the following language of Chancellor Kent is quoted with approval:

"The conclusion then is that in judicial matters the concurrent jurisdiction of the state tribunals depends altogether upon the pleasure of Congress, and may be revoked and extinguished whenever they think proper in every case in which the subject matter may constitutionally be made cog-

nizable in the Federal courts, and that without an express provision to the contrary the state courts will retain a concurrent jurisdiction in all cases where they had jurisdiction over the subject matter."

Upon this point, Judge Shiras in Murray v. R. R. Co., 62 Fed., 42, says:

"A further point is made in support of the demurrer to the effect that this court succeeds only to the jurisdiction of the state court in which the action was originally brought, and that state courts have no jurisdiction over cases arising out of inter-state commerce, the argument being that, as the state cannot legislate touching inter-state commerce, the state courts are without power to determine cases of the like character. This position is not well taken. The limitations upon the legislative power of the nation and of the several states do not necessarily apply to the judicial branches of the national and state governments. The legislature of a state cannot abrogate or modify any of the provisions of the federal constitution nor of the acts of congress touching matters within congressional control, but the courts of the state in the absence of a prohibitory provision in the federal constitution or acts of congress had full jurisdiction over cases arising under the constitution and laws of the United States. The Courts of the states are constantly called upon to hear and decide cases arising under the federal constitution just as the courts of the United States are called upon to hear and decide cases arising under the laws of the states, when the adverse parties are citizens of different states. The duty of the courts is to expain, apply and enforce the existing law in the particular cases brought before them. If the law applicable to a given case is of federal origin, the legislature of a state cannot abrogate or change it, but the courts of a state may apply and enforce it; and hence the fact that a given subject like inter-state commerce is beyond state legislative control, does not, ipso facto, prevent the courts of a state from exercising jurisdiction over cases which grow out of this commerce. Had this action remained in the state court, in which it was originally brought, that court would have had jurisdiction to hear and determine the issues between the parties, because congress has not enacted that jurisdiction over cases of this character is confined exclusively to the courts of the United States, and therefore the jurisdiction of the state court was full and complete."

In Claflin v. Houseman. 93 U. S., 130, the court says:

"The statutes of the United States are as much the law of the land in any state, as are those of the state, and although exclusive jurisdiction for their enforcement may be given the federal courts, yet where it is not given either expressly or by necessary implication, the state courts having competent jurisdiction may be resorted to."

III.

MAY A COURT LOOK TO THE RULES OF THE COMMON LAW FOR GUIDANCE IN DETERMINING CONTROVERSIES BETWEEN LITIGANTS RELATING TO, AND ARISING OUT OF INTER-STATE COMMERCE?

The real contention urged by plaintiff in error however is not merely that a state court as such, is without jurisdiction, but that all courts, Federal or State, are without authority to grant relief in case of wrongful discrimination, if it involves inter-state business, that is to say, it contends that there is no law affording relief in such cases.

This was the contention of plaintiff in error in its argument against the sufficiency of the petition in the state Supreme Court. It was then claimed, as we have seen, that Congress had not by express statute, given a right of action, and that the common law as to such transactions, did not exist, and its principles could not be looked to for the purpose of granting relief to the injured party.

This subject was exhaustively examined in the case of Murray v. the N. W. Ry. Co., 62 Fed., 24.

In his opinion Judge Shiras cites authorities at great length in support of the position that the rules of common law are applicable to transactions relating to inter-state

commerce and he distinctly held in that case that an action to recover damages for wrongful discrimination by a common carrier in inter-state shipments could be maintained.

In this connection among other things Judge Shiras, in Murray v. R. R. Co., supra, says:

"What more disasterous restraint upon the true fredom of foreign and inter-state commerce could be devised than the adoption of the doctrine that the inaction of congress left the carriers engaged therein entirely free to accept and transport the property of one man or corporation, and to refuse to accept the like property of another., or to transport the products of one locality and refuse to transport those of another; to charge an enormous toll upon the property of one, and carry that of his neighbor for nothing? Can it be possible that the trans-continental railways and other federal corporations engaged in foreign and inter-state commerce, in the absence of congressional legislation, were not under any legal restraints, and that the citizen in his dealings with them, was without legal remedy or protection? In the absence of congressional legislation, what law could be applied to them with regard to matters under the exclusive control of the national government except the principles of the common law, or the law maritime? I cannot yield assent to the broad proposition that as to those subjects over which congress is given exclusive legislative control, there is no law in existence if congress has not expressly legislated in regard thereto. The true doctrine, in my judgment is that the constitution of the United States, when it was adopted gave full recognition to the existing systems of the law of nations, of admiralty and maritime, of the common law and equity."

This case was taken to the Court of Apeals, and the question involved was discussed at length in the opinion of Judge Caldwell, 92 Fed., 868. In delivering the opinion of the court he says:

"For more than a century, the Federal Courts in the absence of a statute or other obligatory rule of decision have had recourse to the common law for rules of decisions

in the trials of cases in these courts, and have in cases where that law furnished an appropriate rule of decision, rested their judgment on it.

"It has always been assumed that the Federal Courts were endowed with power and jurisdiction adequate to the decision of every cause, and every question in a cause presented for their consideration, and to apply to their solution and decision, every rule of the common law, admiralty law, equitable law, or civil law applicable to the case that would aid them in reaching a just result, which is the end for which courts were created.

"It is implied in the very act of their creation that Federal courts would appeal to the common law as their guide in cases where it was applicable. A decision rested on that law no more raised a constitutional question than a decision based on the law merchant, the admiralty law, equitable law or any authority of fundamental principle of right and justice in a case of first impression.

"We are all of the opinion that a constitutional question is not presented every time a court has occasion to apply the well settled rules of common law regluating and defining the rights, duties, and obligations of common carriers, whether the carriage in inter-state, or intra-state."

In the case of Inter-state Commerce Commission v. Ry. Co., 145 U. S., 263, Justice Brown, delivering the opinion of the court says:

"Prior to the enactment of the act of Feb. 4, 1887, to regulate commerce, commonly known as the Inter-State Commerce Act, railroad traffic in this country was regulated by principles of common law applicable to common carriers."

In Railway Co. v. Osborne, 52 Fed., 912, Judge Brewer speaking for the Court said of the inter-state commerce act:

"It was the first effort of the general government to regulate the great transportation business of the country.

That business, though of a quasi public nature, and therefore subject to a governmental regulation, has as a matter of fact been carried on by private capital through corporations. The fact that it was a public business has always prevented the owners of capital invested in it from charging, like owners of other property, any price they saw fit, for its use. A reasonable compensation was all they could exact, and he who felt aggrieved by a charge could always invoke the aid of the courts to protect himself against it."

The distinguished law writer, Melville M. Bigelow, in a note in the 5th Ed. of Story on the Constitution, page 112, says, in speaking of this question:

"It would be a most extraordinary state of things that the common law should be the basis of jurisprudence of the states originally composing the Union, and yet the government engrafted in the existing union should have no jurisdiction at all."

In the case of Chicago, Milwaukee, etc. Ry. v. Solan, 169 U. S., page 136., Justice Gray, in delivering the opinion of the court, says:

"The question of the right of a railroad corporation to contract for an exemption from liability for its own negligence, is indeed like other questions affecting its liability as a common carrier of goods or passengers one of those questions not of mere local law, but of commercial law, or general jurisprudence in which this court in the absence of express statute regulating the subject will exercise its own judgment uncontrolled by the decisions of the courts of the state, in which the cause of action arises. But the law to be applied is no less the law of the state; and may be changed by its legislature except so far as restrained by the constitution of the state, or by the constitution or laws of the United States."

See also on this subject 6th Am. & Eng. Ency. of Law, 2nd Ed., pages 285—286.

In the case of the Western Union Telegraph Co. v. James, 162 U. S., 650, it was held that a statute of the state of

Georgia, requiring telegraph companies to deliver messages with impartiality and good faith, and with due diligence, was valid as to inter-state business.

Referring to this statute, the Supreme Court says:

"The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in the absence of any such statute, and it is in nowise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing this general duty of the company. The directon that the delivery of the message shall be made with impartiality and in good faith and with due dilligence, is not an addition to the duty which it would owe in the absence of such a statute. Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of, or an obstruction to inter-state commerce within the meaning of that clause of the federal constitution under discussion? We think not."

IV.

Authorities May Be Found in Express Enactment of Congress in Support of the Judgment of the State Court.

While the decision of the state Supreme Court in the case at bar was rested on the common law, it appears that there was in fact, an express act of Congress giving a right of action for damages against the telegraph company for wrongful discrimination.

It has been seen that the plaintiff in error in this case alleges in its anwer that it is a government aided telegraph company, and that on the 5th day of June, 1867, it duly filed its written acceptance with the Post Master General of the United State of the restrictions and obligation of the

act of Congress entitled "an act to aid in the construction of telegraph lines, and to secure to the government the use of the same for post, military and other purposes." Which act was approved July 24th, 1866.

In Chapter 772, Vol. 25, Laws of the United States of 1888, it is provided that telegraph companies such as the plaintiff in error herein

"Shall so operate their respective telegraph lines as to afford equal facilities to all without discrimination in favor or against any person or company, or corporation whatever."

Certainly if such telegraphic company would charge one patron three times as much for certan services as it would its competitor for the same services, such act would be in violation of the provision of the law above quoted. This would be a discrimination against one patron and against the other.

Section 5 of the same act provides that the party injured by reason of the telegraph company's refusal to give equal facilities, may maintain an action for damages in the United States Courts. The fact that a right of action is given in a Federal Court does not raise the presumption that the jurisdiction of all other courts over such subject is excluded.

In discussing this question in the case of Plaquemines Fruit Co. 170 U. S., 515, this court quotes with approval from Chief Justice Taney, as follows:

"The true rule of this case is, I think, the rule which is constantly applied to the ordinary acts of legisation, in which

the grant of jurisdiction over certain subject matter to one court, does not of itself imply that the grant is to be exclusive."

Referring to the opinion of Chief Justice Taney, in the above case, the court further says:

"This case it is true, does not present any question as to the jurisdiction of the state courts, but it affirms the rule that a grant of original jurisdiction to a particular court in enumerated cases, does not of itself import that the jurisdiction of that court is exclusive in such cases'

In Silver v.. State of Missouri, 101 Mo., 79, it

"When the act of Congress under which a draw bridge was built, provides that when any litigaion arises from any obstruction or alleged obstruction to the free navigation of the river, the case may be tried in the District Court of the United States in which any portion of said bridge or obstruction touches; such provision does not divest the state court of jurisdiction in such cases."

The following decisions hold the same doctrine:

Mo. River Packet Co. v. Ry. Co., 79 Mo. 478.

Ordway v. Bank, 47 Md., 217.

Raisler v. Oliver, 97 Ala., 710.

The statutes of Nebraska contain similar provisions against wrongful discriminations, and giving to the party injured action for damages sustained. Section 8, Chapter 89 A provides as follows:

"Sec. 8. It shall be unlawful for any telegraph company, association or organization engaged in the business of forwarding dispatches by telegraph to demand, collect or receive from any publisher or proprietor of a newspaper any greater sum for a given service than it demands, charges, or collects from the publisher or proprietor of any other newspaper for a like service, and the violation of the provisions of sections seven and eight of this act by any telegraph company or association shall constitute a misdemeanor, and upon conviction, said telegraph company or association shall be fined for each and every offense in any sum not less than one hundred ($100.00) nor more than one thousand dollars ($1,000.00) with cost of prosecution, and in addition thereto such telegraph company or association shall be liable for all damages sustained by the person or parties in consequence of such discrimination,"

The foregoing statutes relating to telegraph companies and their liability for damages in case they discriminate between patrons, is declaratory of the rule of common law on which the state supreme court based its decision in the case at bar.

In the case of Lowry v. C. B. & Q. Ry. Co., 46 Fed., was an action to recover damages for wrongful discrimination. It was therein contended that the petition was drawn under the common law, and not under the inter-state commerce act which was then in force.

In his opinion, Judge Caldwell in referring to this opinion says:

"It must be conceded that a complaint would be good at common law and it is true that the provision of the inter-state commerce act, prohibiting unjust and unreasonable charges and unjust discrimination, are merely declaratory

of the common law, and the remedies afforded by the act of Congress for such practices, are cumulative, and not exclusive of the remedy existing at common law."

We respectfully submit that the proceedings in error should be dismissed or the judgment of the state court affirmed.

FRANKLIN W. COLLINS,

Solicitor for Defendant in Error.

JOHN M. STEWART,

of Counsel.

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Error.

Supreme Court of the United States.

No. 117.—October Term, 1900.

The Western Union Telegraph Company, Plaintiff in Error, *vs.* The Call Publishing Company. } In error to the Supreme Court of the State of Nebraska.

[April 15, 1901.]

This was an action commenced on April 29, 1891, in the District Court of Lancaster County, Nebraska, by the Call Publishing Company to recover sums alleged to have been wrongfully charged and collected from it by the defendant, now plaintiff in error, for telegraphic services rendered. According to the petition the plaintiff had been engaged in publishing a daily newspaper in Lincoln, Nebraska, called The Lincoln Daily Call. The Nebraska State Journal was another newspaper published at the same time in the same city, by the State Journal Company. Each of these papers received Associated Press dispatches over the lines of defendant. The petition alleged:

"4th, That during all of said period the defendant wrongfully and unjustly discriminated in favor of the said State Journal Company and against this plaintiff, and gave to the State Journal Company an undue advantage, in this: that while the defendant demanded, charged and collected of and from the plaintiff for the services aforesaid seventy-five dollars per month for such dispatches, amounting to 1,500 words or less daily, or at the rate of not less than five dollars per 100 words daily per month, it charged and collected from the said State Journal Company for the same, like and contemporaneous services only the sum of $1.50 per 100 words daily per month.

"Plaintiff alleges that the sum so demanded, charged, collected and received by the said defendant for the services so rendered the plaintiff, as aforesaid, was excessive and unjust to the extent of the amount of the excess over the rate charged the said State Journal Company for the same services, which excess was three dollars and fifty cents per one hundred words daily per month, and to that extent it was an unjust and wrongful discrimination against the plaintiff and in favor of the State Journal Company.

"That plaintiff was at all times and is now compelled to pay said excessive charges to the defendant for said services or to do without the same; that plaintiff could not dispense with such dispatches without very serious injury to its business."

The telegraph company's amended answer denied any unjust discrimination; denied that the sums charged to the plaintiff were unjust or excessive, and alleged that such sums were no more than a fair and rea-

sonable charge and compensation therefor, and similar to charges made upon other persons and corporations at Lincoln and elsewhere for similar services. The defendant further claimed that it was a corporation, engaged in interstate commerce; that it had accepted the provisions of the act of Congress entitled "An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal and other purposes," approved July 24, 1866; that it had constructed its lines under the authority of its charter and that act, and denied the jurisdiction of the courts of Nebraska over this controversy. A trial was had, which resulted in a verdict and judgment for the plaintiff, which judgment was reversed by the Supreme Court of the State. (44 Neb. 326.) A second trial in the district court resulted in a verdict and judgment for the plaintiff, which was affirmed by the Supreme Court of the State, (58 Neb. 192,) and thereupon the telegraph company sued out this writ of error.

Mr. Justice BREWER delivered the opinion of the Court.

The contention of the telegraph company is substantially that the services which it rendered to the publishing company were a matter of interstate commerce; that Congress has sole jurisdiction over such matters, and can alone prescribe rules and regulations therefor; that it had not at the time these services were rendered prescribed any regulations concerning them; that there is no national common law, and that whatever may be the statute or common law of Nebraska is wholly immaterial; and that therefore, there being no controlling statute or common law, the State court erred in holding the telegraph company liable for any discrimination in its charges between the plaintiff and the Journal company. In the brief of counsel it is said: "The contention was consistently and continuously made upon the trial by the telegraph company that, as to the State law, it could not apply for the reasons already given, and that, in the absence of a statute by Congress declaring a rule as to interstate traffic by the telegraph company, such as was appealed to by the publishing company, there was no law upon the subject." The logical result of this contention is that persons dealing with common carriers engaged in interstate commerce and in respect to such commerce are absolutely at the mercy of the carriers. It is true counsel do not insist that the telegraph company or any other company engaged in interstate commerce may charge or contract for unreasonable rates, but they do not say that they may not, and if there be neither statute nor common law controlling the action of interstate carriers, there is nothing to limit their obligation in respect to the matter of reasonableness. We should be very loath to hold that in the absence of Congressional action there are no restrictions on the power of interstate carriers to charge for their services; and if there be no law to restrain, the necessary result is that there is no limit to the charges they may make and enforce.

It may be well at this time to notice what the exact rulings of the State court were: The charge to the plaintiff was $5 per 100 words, and to the State Journal Company $1.50 per 100 words. When the case came to the Supreme Court for examination of the proceedings in the first trial it appeared that no proper exceptions to the instructions had been preserved, and the only question, therefore, for consideration was the sufficiency of the evidence to sustain the verdict, and the court held that the mere fact of a difference in charge was not sufficient to invalidate the contract made with the plaintiff, and that there was no satisfactory evidence that the difference in the charge was unreasonable. In the course of its opinion the court said:

"There was no evidence tending to show that the charge to the Call Company was in itself unreasonably high, that the charge to the Journal Company was unreasonably low or that the charge to either was greater or less than the ordinary or reasonable charge to others for similar services. It follows, therefore, that the verdict was sustained by the evidence if, as a matter of law, it was sufficient to show either that another person was obtaining dispatches for a less sum than the plaintiff, without regard to differences in conditions, or if it was sufficient to show a difference in rate accompanied by a difference in conditions, leaving to the jury, without other evidence, the duty of comparing the difference in rates with the difference in conditions, and determining without other aid whether or not the difference in rates was disproportionate to the difference in conditions. But the verdict was not sustained by the evidence if a mere difference in rates without regard to conditions was insufficient to ground a right of action, or, a difference both in rates and conditions being shown, it was also necessary to establish by evidence that these differences were disproportionate. . . . As we have already stated, a considerable difference in the absolute rate charged the Call Company and the Journal Company was shown, but there was also shown a difference in conditions affecting the expense and difficulty of rendering the services which at common law would justify some difference in rates, and this difference was one which the proviso quoted from the seventh section of our statute expressly recognizes as justifying a discrimination in this State. There was no evidence to show that the rate charged the Call Company was unreasonably high. There was no evidence to show that the rate charged the Journal Company was unreasonably low. There was no evidence to show what difference in rates was demanded or justified by the exigencies of the differences in conditions of service. We do not think that the enforcement of contracts deliberately entered into should be put to the hazard of a mere conjecture by a jury without evidence upon which to base its verdict. How can it be said that a jury acts upon the evidence and reaches a verdict solely upon consideration thereof when, having established a difference in rates and a difference in conditions, without anything to show how one difference affects the other, or to what extent it is permitted to measure one against the other, and to say that to the extent of one dollar or to the extent of one thousand dollars the difference in rates was disproportionate to the difference in conditions? It may be said that it would be difficult to produce evidence to show to what extent such differences in conditions reason-

ably affect rates. This may be true, but the answer is that whatever may be the difficulties of the proof, a verdict must be based upon the proof and a verdict must be founded upon evidence and not upon the conjecture of the jury, or its general judgment as to what is fair, without evidence whereon to found such judgment."

Under this construction of the law the first judgment was reversed and the second trial proceded upon the lines thus laid down by the Supreme Court. On that trial the court charged:

"You are instructed that not every discrimination in rates charged by a telegraph company is unjust. In order to constitute an unjust discrimination there must be a difference in rates under substantially similar conditions as to service; the rate charged must be a reasonable rate; under like conditions it must render its services to all patrons on equal terms; it must not so discriminate in its rates to different patrons as to give one an undue preference over another.

"It is not an undue preference to make one patron a less rate than another where exist differences in conditions affecting the expense or difficulty in performing the services which fairly justify the difference in rates, and where it is shown that a difference in rate exists, but there is also a substantial difference in conditions affecting the difficulty or expense of performing the service, no cause of action arises without evidence to show that the difference in rates is disproportionate to the difference in conditions.

"In this action there is shown to exist, not only, on the one hand, a difference in the rates charged to the patrons of the telegraph company, the Call Publishing Company and the State Journal Company, but, on the other hand, also a difference in the conditions under which the telegraph services were rendered to the two companies, and the question that you have particularly to direct your attention to is how far this difference in condition justified the difference in rates charged; to what extent, if any, the difference in rates charged the rival companies was disproportioned to the difference in conditions under which the services were rendered. If you find such disproportions to have existed, and that by reason thereof the amount charged the plaintiff was in excess of what a reasonable rate would be under the circumstances, then you are to find, if facts have been presented to you by which you can find, the amount of such excess as the amount which the plaintiff would be entitled to recover.

"The burden of proof is upon the plaintiff to show by a preponderance of the evidence the existence of the discrimination claimed by it; also that the differences in conditions shown are disproportionate to the difference in charges made, as well as all the other material allegations of its petition.

"You should approach this case, not in an attitude as if you were charged with the duty of determining rates for the telegraph company. Its stock is the property of private individuals, who have elected officials for that purpose. They are there to manage the affairs of their corporation in their own way, so long as what they do is within reason. Courts of law are maintained to correct abuses, and it is only after the plaintiff has convinced you that the telegraph company has abused its privileges that the court will interfere. The telegraph company is a common carrier, and is said to

exercise quasi-public functions. On the other hand, the Call Publishing Company has certain legal rights. It embarks in an enterprise in the city of Lincoln. It has for a competitor the State Journal Company, and perhaps others. In its race for success it ought not to be unfairly handicapped. For the purpose of getting the news both it and The Journal use the Associated Press dispatches. In fixing its charges to these two competing companies for these dispatches it is the duty of the telegraph company not to unjustly discriminate in favor of either, as explained to you in these instructions; and, as before stated to you, if the plaintiff has been able to convince you that the defendant has so discriminated, then the telegraph company would be required to answer to the plaintiff in whatever damages the plaintiff has satisfied you he has suffered.

"In arriving at your verdict you should consider whatever evidence there is going to show charges made by the telegraph company to other persons or in other places for like services under like conditions; the increased cost of operating plant occasioned by increased work, if any; the difference of volume of business between the telegraph company's day and night work, as it would be a reasonable discrimination for the company to make this difference the basis for a difference in charges; the difference in charges between day and night services generally, as shown by the evidence; also the difference in the character of the night and day work; the time required to perform it, as shown by the evidence; the charges made by the company for other services unless made under circumstances and conditions different from those under consideration, so as not to furnish a fair criterion as to charges; the general operating expenses of the company as affected by rates charged, as well as all other facts before you which may aid you in arriving at a conclusion. However, this is to be understood: that for the plaintiff to recover it must show the discrimination; that the discrimination was unjust, as explained in these instructions; and, further, you must be able from the evidence furnished you to measure the damages, if any, sustained by the plaintiff. You are not to fix the damages in any haphazard manner, nor by mere speculation, but by reasons sustained by the evidence and showing in a reasonable way the amount thereof.

"The jury are instructed that the defendant telegraph company is not presumed to have unjustly discriminated against any of its patrons and in favor of certain other of its patrons, but, on the contrary, it is presumed to have properly and justly established its rates according to the various kinds of service it may be called upon to render, considering its duty to the public and to its stockholders."

And it was under these instructions that the jury returned a verdict for the plaintiff. The case, therefore, was not submitted to the jury upon the alleged efficacy of the Nebraska statute in respect to discriminations, but upon the propositions distinctly stated, that where there is dissimilarity in the services rendered a difference in charges is proper, and that no recovery can be had unless it is shown, not merely that there is a difference in the charges, but that that difference is so great as, under dissimilar conditions of service, to show an unjust discrimination, and that the recovery must be limited to the amount of the unreasonable discrimination.

No one can doubt the inherent justice of the rules thus laid down. Common carriers, whether engaged in interstate commerce or in that wholly within the State, are performing a public service. They are endowed by the State with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render. As a consequence of this, all individuals have equal rights both in respect to service and charges. Of course, such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon. There is no cast iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the service shall be exactly along the same lines. But that principle of equality does forbid any difference in charge which is not based upon difference in service, and even when based upon difference of service, must have some reasonable relation to the amount of difference, and cannot be so great as to produce an unjust discrimination. Now to affirm that a condition of things exists under which common carriers anywhere in the country, engaged in any form of transportation, are relieved from the burdens of these obligations, is a proposition which, to say the least, is startling. And yet, as we have seen, that is precisely the contention of the telegraph company. It contends that there is no Federal common law, and that such has been the ruling of this court; there was no Federal statute law at the time applicable to this case, and the matter of interstate commerce, being wholly removed from State jurisdiction, the conclusion is reached that there is no controlling law, and the matter is left entirely to the judgment or whim of the telegraph company.

This court has often held that the full control over interstate commerce is vested in Congress, and that it cannot be regulated by the States. It has also held that the inaction of Congress is indicative of its intention that such interstate commerce shall be free, and many cases are cited by counsel for the telegraph company in which these propositions have been announced. Reference is also made to opinions in which it has been stated that there is no Federal common law different and distinct from the common law existing in the several States. Thus, in *Smith* v. *Alabama*, (124 U. S. 465,) it was said by Mr. Justice Matthews, speaking for the court:

"There is no common law of the United States in the sense of a national customary law distinct from the common law of England as adopted by the several States, each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes. (*Wheaton* v. *Peters*, 8 Pet. 591.) A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular State. This arises from the circumstance that courts of the United States, in cases within their jurisdiction where they are called upon to administer the law of the State in which they sit,

or by which the transaction is governed, exercise an independent, though concurrent, jurisdiction, and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of *Railroad Co.* v. *Lockwood*, (17 Wall. 357,) where the common law prevailing in the State of New York in reference to the liability of common carriers for negligence received a different interpretation from that placed upon it by the judicial tribunals of the State; but the law as applied is none the less the law of that State." (p. 478.)

Properly understood, no exceptions can be taken to declarations of this kind. There is no body of Federal common law separate and distinct from the common law existing in the several States in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several States. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress.

What is the common law? According to Kent: "The common law includes those principles, usages and rules of action applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature." (1 Kent, 471.) As Blackstone says: "Whence it is that in our law the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority; and of this nature are the maxims and customs which compose the common law, or *lex non scripta*, of this kingdom. This unwritten, or common, law is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification." (1 Blackstone, 67.) In Black's Law Dictionary, page 232, it is thus defined: "As distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England."

Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law, as so defined, and are subject to no rule except that to be found in the statutes of Congress? We are clearly of opinion that this cannot be so, and that the principles of the common law are operative upon all interstate commercial transactions except so far as they are modified by Congressional enactment.

But this question is not a new one in this court. In *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.*, (145 U. S. 263, 275,) a case which involved interstate commerce, it was said by Mr. Justice Brown, speaking for the court:

"Prior to the enactment of the act of February 4, 1887, to regulate commerce, commonly known as the interstate commerce act, (24 Stat. 379, c. 104,) railway traffic in this country was regulated by the principles of common law applicable to common carriers."

In *Bank of Kentucky* v. *Adams Express Co.*, and *Planters' Bank* v. *Express Co.*, (93 U. S. 174, 177,) the express companies received at New Orleans certain packages for delivery at Louisville. These were interstate shipments. In the course of transit the packages were destroyed by fire, and actions were brought to recover the value thereof. The companies defended on the ground of an exemption from liability created by the contracts under which they transported the packages. Mr. Justice Strong, delivering the opinion of the court, after describing the business in which the companies were engaged, said:

"Such being the business and occupation of the defendants, they are to be regarded as common carriers, and, in the absence of stipulations to the contrary, subject to all the legal responsibilities of such carriers."

And then proceeded to show that they could not avail themselves of the exemption claimed by virtue of the clauses in the contract. The whole argument of the opinion proceeds upon the assumption that the common law rule in respect to common carriers controlled.

Reference may also be made to the elaborate opinion of District Judge Shiras, holding the Circuit Court in the Northern District of Iowa, in *Murray* v. *Chicago & Northwestern Ry. Co.*, (62 Fed. Rep. 24,) in which is collated a number of extracts from opinions of this court, all tending to show the recognition of a general common law existing throughout the United States, not, it is true, as a body of law distinct from the common law enforced in the States, but as containing the general rules and principles by which all transactions are controlled, except so far as those rules and principles are set aside by express statute. It would serve no good purpose to here repeat those quotations; it is enough to refer to the opinion in which they are collated.

It is further insisted that even if there be a law which controls there is no evidence of discrimination such as would entitle the plaintiff to the verdict which it obtained. But there was testimony tending to show the conditions under which the services were rendered to the two publishing companies, and it was a question of fact whether, upon the differences thus shown, there was an unjust discrimination. And questions of fact, as has been repeatedly held, when once settled in the courts of a State, are not

subject to review in this court. (*Dower* v. *Richards*, 151 U. S. 658; *Egan* v. *Hart*, 165 U. S. 188; *Chicago, Burlington &c. Rd.* v. *Chicago*, 166 U. S. 226–242; *Hedrick* v. *Atchison, Topeka & Sante Fe R. R. Co.*, 167 U. S. 673, 677; *Gardner* v. *Bonestell*, 180 U. S. 362.)

These are the only questions of a Federal nature which are presented by the record, and finding no error in them the judgment of the Supreme Court of Nebraska is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.